APPENDIX A

No. 81-1157

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

On Appeal from the
United States District
Court for the Eastern
District of Michigan

Sears, Roebuck and Company,
Plaintiff-Appellee,

v.

Teamsters Local Union No. 243,
affiliated with the International
Brotherhood of Teamsters,
Chauffeurs, Warehousemen and
Helpers of America,
Defendant-Appellant.

Decided and Filed July 16, 1982

Before: EDWARDS, Chief Circuit Judge; MARTIN, Circuit Judge; and WALINSKI, District Judge.*

PER CURIAM. Teamsters Local 243 appeals an order of the District Court vacating an arbitration award.

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*Honorable Nicholas J. Walinski, District Judge, United States District Court for the Northern District of Ohio, sitting by designation.

Local 243 is the collective bargaining representative for warehouse and service employees at five Sears stores in the Detroit, Michigan area. Twelve percent of this bargaining unit consists of "MA" sales employees who sell Sears appliance maintenance contracts by telephone.

In December, 1978, Sears subcontracted the work of the entire MA sales staff, thereby eliminating ninety jobs. The laid-off employees were permitted to "bump" into other job classifications pursuant to the Job Elimination clause of the collective bargaining agreement.

The Union protested Sears' action and the issue was submitted to arbitration.

The crux of the question before the arbitrator was whether the collective bargaining agreement between Local 243 and Sears permits such extensive subcontracting. The agreement contains a subcontracting clause which reads, in its entirety:

> Section 10. A. The right to subcontract any type of work within the jurisdiction of the Union shall be vested exclusively with the Company, provided however, that such right to subcontract shall be restricted to work that can be performed more efficiently and economically outside of the bargaining unit, and no work shall be subcontracted solely to discriminate against the Union.
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> B. The Company agrees, prior to the actual subcontracting, the Company will substantiate such action by submitting facts and figures that the work involved can be done more efficiently and economically.

The arbitrator recognized that the collective bargaining agreement does not, on its face, limit Sears' authority to subcontract in the interest of efficiency and economy, provided it does not do so in an effort to undermine the bargaining unit. He specifically found that Sears had demonstrated the requisite

bona fides in entering into the challenged subcontract. Nevertheless, the arbitrator declined to rely on the "plain language" of the agreement. Instead, he applied a "balancing test" and concluded that the costs to the Union of the disputed subcontract outweighed its benefits to the employer. On this rationale, he ordered reinstatement of the MA sales unit, with back pay to the laid-off employees.

Sears appealed to the District Court for the Eastern District of Michigan. The District Judge, in a thorough opinion, found that the arbitrator had exceeded his authority when he inferred limitations on subcontracting beyond those contained in the collective bargaining agreement itself. We must agree, even though the result in this case is harsh.

We are fully cognizant of the favored status the federal law accords arbitration and arbitrators' awards. *See* the "Steelworkers Trilogy" beginning at 363 U.S. 564 (1960); *Retail Clerks* v. *Leon Dry Goods, Inc.*, 341 F.2d 715 (6th Cir. 1965). An arbitrator's powers are not, however, completely untrammelled. As the Supreme Court observed in *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), the third of the "Trilogy" cases.

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from any sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

This court has consistently adhered to the principle that an arbitrator may construe ambiguous contract language, but lacks authority to disregard or modify plain or unambiguous contract provisions. *See Detroit Coil* v. *Int. Assn. of Machinists &*

Aerospace Workers, 594 F.2d 1093 (6th Cir. 1979); *Amanda Bent Bolt* v. *U.A.W., Local 1549,* 451 F.2d 1277 (6th Cir. 1971). In the present case, we cannot escape the conclusion that the arbitrator exceeded his authority by amending the express terms of the agreement negotiated by the parties.

The authorities cited by the arbitrator in support of his use of a "balancing test" in this case are inapposite. There is, as the District Court explained, a critical distinction in arbitration cases between collective bargaining agreements which are silent on the question of subcontracting and those which specifically address the issue.

In the former instance, it is accepted practice for arbitrators to infer a "reasonableness" limitation on the employer's right to subcontract; "reasonableness" is determined by a "balancing test" or cost-benefit analysis. *See, e.g., Meade Corp.,* 62 LA 1000 (Bothwell, 1973). Where a collective bargaining agreement is silent, it falls to the arbitrator to fill the "inevitable lacunae." *See United Steelworkers* v. *New Park Moving Co.,* 273 F.2d 342, 356 (10th Cir. 1959) and cases cited therein.

On the other hand, when the parties to a collective bargaining agreement have negotiated a clear, unambiguous subcontracting provision, an arbitrator lacks discretion to alter the effect of that provision by performing, *sua sponte,* a "balancing test." The weight of authority supports this conclusion. *See, e.g., Laclede Gas Co.,* 67 LA 461 (David, 1976); *Electric Storage Battery Co.,* 44 LA 782 (Koven, 1965). *See also Timkin Co.* v. *Local Union No. 1123, 482 F.2d 1012, 1014 (6th Cir. 1973). Contra Consolidated Aluminum Co.,* 66 LA 1170 (Boals, 1976). The subcontracting clause before us simply cannot be characterized as "ambiguous" or subject to conflicting interpretations. *Cf. Am. Fed. of T.V. & Radio Artists* v. *Storer Broadcasting Co.,* 660 F.2d 151 (6th Cir. 1981); *Johnson Bronze Co.* v. *U.A.W.,* 621 F.2d 81 (3d Cir. 1980). Under these

circumstances, the District Court was correct in holding that Sears is entitled to the benefit of its bargain, even though that bargain may, in our eyes, seem "unfair" or inequitable.

The judgment of the District Court is affirmed.

No. 81-1157

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Sears, Roebuck and Company,
Plaintiff-Appellee

v.

Teamsters Local Union No. 243,
affiliated with the International
Brotherhood of Teamsters, Chauffeurs,
Warehousemen and Helpers of America,
Defendant-Appellant

ORDER

(Filed Sept. 13, 1982)

Before: EDWARDS, Chief Circuit Judge; MARTIN, Circuit Judge; and WALINSKI, District Judge.*

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above-styled case; and

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*Honorable Nicholas J. Walinski, District Judge, United States District Court for the Northern District of Ohio, sitting by designation.

No judge in active service in this Court having moved for rehearing en banc and the motion therefore having been referred to the panel which heard the case; and

The panel having noted nothing of substance in said motion for rehearing which had not been carefully considered before issuance of the Court's opinion,

Now, therefore, the motion for rehearing is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX B

AMERICAN ARBITRATION ASSOCIATION

A.A.A. No. 54 39 0198 7

In the Matter of Arbitration Between:

Sears, Roebuck & Company

-and-

Local No. 243, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America

APPEARANCES:

For the Employer: S. Richard Pincus, Esq. and Burton L. Reiter, Esq.

For the Union: Matthew R. Robbins, Esq.

Chairman of the Arbitration Panel: Richard L. Kanner

Company panel member: Edward L. Thomas

Union panel member: David Somerville

ISSUE: Did the Company violate the collective bargaining agreement by subcontracting Maintenance Agreement Sales Department work?

Arbitration was held in the captioned matter pursuant to contract. Briefs and Reply Briefs were submitted on or about January 24, 1980 and the hearing declared closed.

Background

The Maintenance Agreement Sales Department (MA Sales) employees sell, by telephone, the Company's Maintenance Agreement covering maintenance of the Company's appliances. Each week clerks receive a book of leads, and they are expected to sell a certain minimum number of such leads at a certain minimum gross dollar amount.

On September 18, 1978 a strike occurred between the Bargaining Unit and the Company lasting until November 29, 1978 over a wage reopener in the contract. On December 14, 1978, approximately two (2) weeks after settlement of the strike, the Company entered into a sub-contract with GLS whereby "GLS will conduct telephone and direct mail programs to sell Maintenance Agreements (MS's) for Sears Detroit Group." (Company Exhibit #1) The contract became effective on February 1, 1979. As a result of said subcontract, approximately ninety (90) employees or 12% of the Bargaining Unit were laid off.

On January 4, 1979 Company representatives, Mr. John Scavone and Mr. Arnold Laveleck notified the Union's business representative, Mr. James Esser, of the Company's decision to subcontract. On January 10, 1979 the Company provided the Union with the "facts and figures" that it relied upon in deciding to subcontract such Bargaining Unit work (Company Exhibits #5 and #6) pursuant to the following contract provisions:

> Article I. Recognition and Representation
>
> Section 10.
>
> "A. The right to subcontract any type of work within the jurisdiction of the Union shall be vested exclusively with the Company, provided, however, that such right to subcontract shall be restricted to work that can be performed

more efficiently and economically outside of the bargaining unit, and no work shall be subcontracted solely to discriminate against the Union.

B. The Company agrees, prior to the actual subcontracting, the Company will substantiate such action by submitting facts and figures that the work involved can be done more efficiently and economically."

Grievance was filed claiming that such action was in violation of the contract. The Union requests that the Company be required to re-establish the MA Sales Unit, and to make the affected employees whole for all losses.

Lack Of Adequate Notice
(a) Did The "Notice" To The Union
In June And July 1978 Conform To The Mandate
In Article 1 Subsection 10 b.

Initially, the Union argues that the Company violated Subsection 10 b. above in that the Company did not give it adequate notice by submitting "facts and figures" justifying the subcontract "prior to the actual subcontracting."

In early February, 1978, Mr. Larry Trettenaro, formerly group manager of Sear's Louisville, Kentucky group, assumed his new position as manager of the Detroit group. Shortly after assuming this responsibility Trettenaro met with managers having responsibilities in various phases of the Company's Detroit operations to assess those operations. Among those met with was John Scavone, the group service manager, whose responsibilities included the maintenance agreement (hereafter "MA sales") sales operation. In the course of that meeting, Trettenaro noted the apparent disparity between Detroit's MA sales and those of comparable groups, Cleveland and Chicago, and asked that Scavone monitor sales over the succeeding months and report the results to Trettenaro. (Tr. 287). Scavone did so and, as a result, found that between January and May, 1978, the

ratio of MA sales to group merchandise sales for Cleveland and Chicago far surpassed Detroit's performance. (Tr. 287-288, 291-293; Co. Ex. 20).[1] For example, in January, 1978 the MA sales in Detroit represented only 5.57% of all merchandise sales while Cleveland and Chicago's ratios were 10.68% and 8.60% respectively. This meant that for each $1,000 of merchandise sold that month, Detroit was selling only $55.70 in MA agreements, while Cleveland and Chicago were selling $106.80 and $80.60 in MA's for the same $1,000 in merchandise sales. Significantly, January's results were duplicated in each of the succeeding months also. (Employer Exhibit 20.) Based upon this analysis, which Scavone presented to Trettenaro in early June, 1978, Trettenaro decided to explore the possibility of whether an experienced outside contractor could perform Sears' MA sales in a more efficient and economic manner.

An exploratory meeting was thereafter arranged for June 13, 1978 between Mr. Trettenaro and other Sears' Detroit group management and Mr. Stephen Lynn, President of Service Marketing and Executive Vice-President of Gracious Lady Service, Inc., (hereinafter referred to as "GLS"). (Tr. 171, 295).[2] At this meeting, Lynn, thoroughly reviewed for Sears' officials the nature, scope and expertise of his Company in the promo-

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[1] Mr. Scavone's analysis only took into account the total phone calls of maintenance agreements - i.e., those conducted by the telephone solicitors. It did not take into account sales of maintenance agreements made by Sears salesmen at the point of sale of merchandise or by servicemen who may make a sale while in a customer's home on a routine service call.

[2] The meeting was arranged by Mr. Al Hubbard, Sears' midwestern territory credit promotion manager, who had worked closely with Lynn's organization in Louisville several years earlier in conjunction with GLS's performance of credit promotion work for the Louisville group. (Tr. 179-180). Trettenaro was the Louisville group manager at that time and was thus personally aware of GLS's performance and capabilities. (Tr. 179-180)

tional sales field for its various customers nationwide[3] and indicated a definite interest in further exploring the feasibility of assuming the MA sales function in Detroit. It was agreed that Lynn would be given the opportunity to personally observe the Sears MA function in operation and to meet with local Sears officials to learn the specific requirements of the job. Assuming Lynn concluded GLS could handle the job, he was invited to make a specific proposal at a later meeting.

As a result, Lynn returned to Detroit on June 20 with Elsie Houde, the senior vice president and national supervisor for GLS, in order to closely observe the sale of maintenance agreements at the Sears Livonia unit and to gather detailed information on Sears' operation. (Tr. 186-187, 296-297; Co. Ex. 9).

On July 20, Lynn met again with Sears executives and presented a detailed written proposal and plan to Sears.

Notice
The Company Position

After reviewing the GLS proposal and after additional discussion with GLS in August and September, 1978, the Company decided in October 1978 to enter into a subcontract with GLS. The parties executed same on December 14, 1978 effective February 1, 1979.

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[3] In detailing the complete background of GLS at the meeting, Lynn represented that his company was recognized as one of the nation's leaders in the field of direct marketing and phone solicitation and, in conjunction therewith, noted that his customers included most of the country's other leading retailers including, Montgomery Ward, J.C. Penney, the May Company and Federated Department Stores. (Tr. 173). GLS had been servicing Sears locations nationwide for the past eighteen years in such activities as new account promotions, sales lead generation, and credit card activation. (Tr. 175).

In mid July, 1978 during the initial stages of discussion with GLS, Mr. Arnold Landeck, the Company's Midwest Employee Relations Representative, met with Mr. James Esser, the Union Business Agent, to "let him know what was in the works." (Tr. 372) Landeck testified as follows:

> "I told [him] that the company was in the process of discussing the possibility of subcontracting the maintenance agreement unit to a subcontractor, we were in the preliminary discussions on this, and that he ought to know about it so that if there was any necessity to have any further discussion with his local and our company I wanted him to let me know."

According to Landeck, Esser made no response other than to state that he would discuss the matter with Bob Coy, Union President (Tr. 373). In mid August, 1978 Landeck and Scavone met with Esser. (Tr. 312, 313, 373) At this meeting Scavone reiterated to Esser that the Sears officials had been discussing the possibility of subcontracting with an outside concern and that, in all likelihood, a subcontracting arrangement would be finalized. (Tr. 313, 314, 374) Again Esser has no response. (Tr. 314)

The Union Position

The Union claims that Esser first learned of the subcontract by the Company's letter dated January 4, 1979. Esser testified that he could not recall any previous discussions with Scavone and Landeck on the subject of the subcontract. (Tr. 109, 110, 404) The Union argues, in this regard, that Landeck's and Scavone's testimony is not credible for the reason that it is unlikely, given Esser's extreme involvement in the MA sales operation that he would have casually treated or forgotten a reference to subcontracting the MA unit. Also, both Landeck and Scavone stated that Esser was surprised when told about the

subcontract on January 4, 1979. Thereby the inference is that Esser had no previous notice.

Discussion And Opinion

While it does strain my credulity that Esser would forget such conversations relative to the possibility of subcontracting, it does appear that he did so. The fact that Esser expressed surprise on January 4, 1979 when advised about the subcontract does not denote that he was not previously told of the possibility thereof by Scavone and Landeck. Such surprise merely evidences the fact that Esser might have forgotten such conversations. It is possible that he did not take the information conveyed by Scavone and Landeck at the July and August, 1978 meetings as a definite indication of a subcontracting decision. I have to credit Scavone's and Landeck's testimony in the fact of Esser's inability to recall the fact that subcontracting of MA was discussed. Esser's testimony that he could not recall such discussions is not tantamount to a flat denial that they could have occurred. Testimony by Esser of non-recollection infers that the fact testified to by Scavone and Landeck could have occurred, but that Esser simply may have forgotten it. In this connection Esser admitted having numerous meetings with both Landeck and Scavone during said period at which various subjects were discussed. (Tr. 109, 110, 404) It is therefore concluded that the subject of the Company's anticipated action to subcontract was mentioned to Esser in July and August, 1978.

Conclusion

However, the above controversy as to when Esser first received "notice" is in my view academic. Subsection 10 b. does not refer to "notice" to the Union of the subcontract, but rather mandates submission of "facts and figures" relative to the subcontract "prior to the actual subcontracting." Thereby, such prior "notice" in June and July, 1978 of a tentative and pro-

spective possibility of the Company's subcontracting MA sales is not a substitute for the mandate in Subsection 10 b. The "notice" required therein is one containing "facts and figures", and not a tenative statement of a "possibility" of subcontracting.

The Company did not decide to enter the subcontract until October 1978 which was the first time it had completed compiling the "facts and figures." It then executed the subcontract on December 14, 1978 effective February 1, 1979. It notified the Union on January 4, 1979, and submitted the "facts and figures" on January 10, 1979. The Union's grievance was filed on January 23, 1979.

Did The Submission Of "Facts And Figures" To The Union On January 10, 1979 Conform To The Mandate Set Forth In Subsection 10 b?

The Union argues that the answer to the above question is no for the reason that it was then faced with the fait accompli. That is to say of what avail are "facts and figures" submitted to the Union on January 10, when the subcontract was executed on December 14 unbeknownst to the Union.[4]

The answer to the above question depends upon whether Subsection 10 b. is a "notice" provision intending only to enable the Union to file a grievance protesting the subcontracting; or does Subsection 10 b. intend that such notice, i.e., submission of "facts and figures," enable the Union to "meet and confer" with the Company so as to afford it the opportunity to change the Company's mind.

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[4]The Union did not know the date of execution of the contract until arbitral hearing.

The Company argues on behalf of the grievance theory asserting that the purpose of Subsection 10 b. is to give the Union sufficient "facts and figures" to enable it to determine whether to file a grievance. If such theory prevails, then, since the Union did grieve on January 23, 1979, it availed itself of all rights given it under Subsection 10 b.

In support of it's theory the Company cites Celotex Corporation 41 LA 464 (Sweeney 1963). The contract therein contained a provision requiring the employer to negotiate with the union "covering wages, wage rates, working arrangements, hours of work, dismissals, seniority rights, or alleged discrimination and for the settlement of any dispute or grievance which may arise during the term of this Agreement." The contract also contained the following provision:

"Article X, Paragraph 194.

> All work customarily performed by the Company in its own plant with its own employees shall continue to be performed by the Company and its employees unless in the judgment of the Company, such work should be performed by outside contractors Provided, however, the decision by the Company will be based on the availability with the plant of adequate tools, equipment, and qualified available working forces for performing the work in an economic, efficient, and timely manner."

The Union argued that the Company was duly bound to negotiate with the Union before subcontracting. Arbitrator Sweeney held to the contrary stating that there were *no specific provisions in the contract mandating bargaining (meet and confer) relative to a subcontract issue.* Arbitrator Sweeney stated as follows:

> "In regarding Paragraph 194, nowhere does it state specifically that the Company is required to bargain with

> the Union concerning each instance of contracting out. Let us note that this could very easily have been placed into the language of this paragraph at the time of its negotiation, thus clearing up all doubt. Since the construction of the language of Paragraph 194 does not specifically require collective bargaining, if it is so required it must come by implication of the whole or part of this paragraph.
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> However, this Arbitrator can see no way in which the wording of Paragraph 194 can be stretched to imply or require that the decision to subcontract or not be put through the collective bargaining process. What Paragraph 194 does imply is exactly what has transpired in this case. The judgment of the Company was challenged and this challenge would finds its way through the grievance procedure and ultimately to arbitration if not settled at a prior step."

Sears further asserts that the Union implicitly agrees with the "grievance theory" in that it did file a grievance containing a request to delay the implimentation of the subcontract "until such time as a decision can be rendered through the grievance procedure." (Joint Exhibit 2)

The Union argues that the intent of Subsection 10 b. is not simply to enable it to file a grievance, but to allow the Union to request a "meet and confer" meeting in order to attempt to convince the company to change it's mind about the subcontract. It cites the case of U.S. Steel 54 LA 1207 (Duff 1970) in support of it's position. In that case a memorandum of understanding recited as follows, inter alia:

> "The Company agrees to notify the Union in advance and *to meet* with the Union, upon request by the Union, for explanation of the reasons causing the Company to decide to contract any production and maintenance work." (Emphasis supplied)

The arbitrator held that the Company had failed such notice and "meet" requirements as stated as follows:

> "After full consideration of all the evidence, we find as a fact, that the Company failed to give proper notice to the Union as required by the Letter of Understanding of July 25, 1967. In addition, the requirement for the Company "to notify the Union in advance" clearly implies that such notification must be made so the proposed contracting out may be rescinded if the Union's objectives convince the Company to reverse its tentative decision."

However, it is ntoed that the memorandum in the U.S. Steel case *specifically mandated a meeting* with the Union "in advance."

The Union further cites Indian Head Inc. 65 LA 707 (Foster 1975). But here again the contract mandated both a notice and a meeting. See also Electric Storage Battery Company 44 LA 782 (Coven, 1965) where the contract recited as follows:

> "Article XII, Section 3:
>
> The Company agrees not to contract out work which is normally performed by the employees, unless in the opinion of the Company the work can be performed more *economically* and *expeditiously* otherwise. If such contracting out at work will result in the lay-off of other than probationary employees the matter will *be discussed* with the Union prior to action being taken by the Company." (Emphasis supplied) (Page 782)

The subject contract does not, however, include such a specific "meeting" provision. As noted in Celotex supra, such clarity is necessary to a finding that negotiations or "meet and confer" is a prerequisite to the Company's right to subcontract.

The Union also cites Fibreboard Corporation vs. NLRB 379 U.S. 203 (1964). The Supreme Court stated as follows relative to the necessity to "meet and confer" prior to the act of subcontracting:

> "Yet it is contended that when an employer can effect cost savings in these respects by contracting out, there is no need to attempt to achieve similar economies through negotiation with existing employees or to provide them with an opportunity to negotiate a mutually acceptable alternative. The short answer is that, although it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective bargaining." *Id.* at 214.

I am not persuaded that the Fibreboard case, supra, is applicable for the reason that it is a labor contract that is herein involved and not the law. While "meet and confer" is a salutory objective in labor relations to attempt to assuage the impact of subcontracting on the bargaining unit, the contract says nothing about such a meeting. The contract simply calls for submission of "facts and figures" to the Union. It is just as plausible to infer that it is necessary for the Union to receive such information in order to file a grievance, as to infer that it gain such information in order to prepare for a "meet and confer" meeting. While a meeting to discuss the subcontract with the Union might be laudatory and good labor relations, I have no authority to add such a "meet and confer" provision to Subsection 10 b.

Broad construction of notice provisions in a contract to include purposes, such as "meet and confer", not specifically contained therein is not to be favored in arbitration. This is for the reason that such failure to follow technical provisions of notice in a contract leads to forfeiture. Hence, the merits of the

controversy are not addressed. That is not to say the notice provisions and time limit provisions are not as substantive as any other contract provision and should be enforced in the same manner. But such provisions should not be expandded beyond the literal phraseology used. Where a "meet and confer" mandate prior to subcontracting is intended in such a notice provision, the contract should spell it out. Accordingly, I conclude in support of Celotex Corporation supra that the intent of Subsection 10 b. is to provide "facts and figures" to the Union in order to enable it to file a grievance, and not to enable it to "meet and confer" prior to the subcontracting.

However, the question still remains as to whether the company violated Subsection 10 b. by submitting such "facts and figures to the Union on January 10, 1979 *after* it had executed the subcontract on December 14, 1978. The company argues that the phrase "prior to the actual subcontracting" means exactly what it says, i.e., the start or implementation of the subcontract, and not merely the execution thereof.

The Union argues to the contrary asserting that the "facts and figures" had to be submitted to it prior to the execution of the subcontract.

Since I have found that the purpose of such notice was to enable the Union to file a grievance, and not for purpose of "meeting and conferring", the issue of the time of such notice appears academic. That is to say, of what import is it for the union to be afforded the opportunity to file a grievance before the execution of a subcontract or after said execution, but before the actual subcontracting of the work. The filing of a grievance will not stop a company from subcontracting, but will simply afford the Union the opportunity to file a grievance requesting that the subcontract be cancelled.

In any event I am persuaded that subsection 10 b. intends the giving of the "facts and figures" to the Union before the sub-

contract work has actually been started and implemented by the subcontractor. That is what the provision literally states. It does not state "before the *execution* of the subcontract." In Corn Products REfining Company 22 L18; 68, 70 (Gilder, 1953) the arbitrator was confronted with the following notice provision:

> "(R) The Company will advise the Union by letter of maintenance work before being performed at the plant by outside concerns, provided such work pertains to the type of work usually performed by the various Mechanical Departments."

Arbitrator Gilder stated:

> "(Such provision)... binds the Company to advise the Union of the fact, *before work on a maintenance job* contracted to an outside concern, of the caliber, usually performed by the Maintenance Department, *is started at the plant*. Underlying this requirement is the recognition that it is smart supervision to let the employees know when outside contractors are being brought in, and that it is only fair to acquaint plant work force with the nature of the work that has been farmed out. But such notice requirement is the whole extent of the Company's commitment on this score. *There is no prohibition against or restraing on the Company's right to have such work done on the outside...*" (Emphasis supplied)

I am persuaded to the rationale in the Corn Products case based on a similar provision as herein involved.

The Strike

The Union asserts that the company entered into the subcontract to penalize and discriminate against the Union because of the Union's strike over the wage re-opener in the contract. Such "discrimination" violates the provision in Subsection 10 a.:

"no work shall be subcontracted solely to discriminate against the Union."

It appears that the parties were negotiating over the wage re-opener in the summer of 1978. The strike occurred on September 13, 1978 and lasted until the end of November, 1978. The subcontrct was executed December 13, 1978. According to the Union, the timing of the subcontract, only two weeks after the end of the strike, significantly points to discrimination and bad faith by the company.

Obviously, if the Union charge is sustained, the above contract provision has been violated by the Company. To penalize a Union for strike activity by subcontracting bargaining unit work is clearly discriminatory. I am not, however, persuaded that the Union has *proved* such discrimination in the subject case.

As aforestated, as early as February, 1978, Larry Trettenaro Manager of the Detroit Group, met with John Scavone, Group Service Manager, to express concern over Detroit's lower MA Sales as compared to Cleveland and Chicago. Scavone monitored the sales figures over the succeeding months until May 1978, and the same conclusion was reached. On June 13, 1978 an exploratory meeting was arranged with Stephen Lynn, Executive Vice President of GLS. Hence, it may be concluded that the initial problem relative to Detroit's poor sales performance was perceived in advance of bargaining with the Union on the wage re-opener. It is conceded that the ensuing negotiations with GLS did occur during the summer of 1078 coincidental with the negotiations over the wage re-opener. However, the mere fact of the juxtaposition of the time of negotiations for a wage re-opener and the strike with the negotiations relative to the subcontract is not, *standing alone,* sufficient proof of discrimination. The burden of proof lies with the Union on this issue.

Further, the above Subsection 10 a. provision emphasizes that the subcontract must be "*solely* to discriminate against the Union. (Emphasis supplied) The fact of a cost savings in the amount of one-third (⅓) of the cost of operation by reason of the subcontract, as more fully hereinafter discussed, appears to be a reason for the subcontract to GLS. Thereby, even assuming arguendo, that the wage re-opener negotiations and ensuing strike *contributed* to the Company's decision to subcontract, *it was not the "sole" reason.*

Arbitral Precedent Relative To The Issue Of The Right Of An Employer To Subcontract

Before addressing the facts herein as bearing upon the right of the Company to subcontract for reasons of efficiency and economy, it is appropriate to first discuss the rationale underlying arbitral precedent on the issue of the employers' right to subcontract

The problem of the employer's right to subcontract has presented arbitrators with the most difficult of issues. Where the contract is silent as to the right to subcontract, the employer's position is generally based squarely on the usual Management Rights provision which reserves to management all rights not expressly given to the Union.[5] Among such reserved rights is the right to subcontract bargaining unit work.

The rationale underlying such reserved right is that management has the right to operate its business as efficiently and economically as possible. The basic reasoning underlying management's position was set forth in the case of *National*

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[5] The subject contract has no Management Rights provision. In such case it is infered that all rights not expressly contracted away are reserved.

Sugar Refining Company, 13 LA 991, 1001 (Feinberg, 1949) as follows:

> "It is true, of course, that job security, and an opportunity to perform available work, is of concern to a union and that the letting of work to outsiders by an employer may in some instances be said to be derogation of the basic purposes of their collective bargaining agreement. Nevertheless, it is also true that where the subject has assumed importance in the relations between the parties a provision is generally inserted in the agreement defining their respective rights. It has almost been universally recognized that in the absence of such a provision any employer may, under his customary right to conduct his business efficiently, let work to outside contractors if such letting is done in good faith and without deliberate intent to injure his employees."

To the contrary Union's have contested management's right to subcontract based on the reserved rights theory. The Union based their argument on the Recognition, Wage, Seniority, the Job Classification provisions in the contract. The rationale underlying the Union's position is that the employer's power to subcontract could effectively destroy the Union. Of what good is the collective bargaining agreement protecting the rights of the Union to represent the bargaining unit, and agreeing to provide seniority and wage protection, if the employer can turn around and lay off a substantial number of employees by contracting out a portion of the work. Thereby an implied limitation on the right to subcontract was found in these provisions. Such reasoning was set forth in the case of *A.D. Juilliard Co.,* 21 LA 713, (Hogan, 1953) as follows:

> "After a thoughtful consideration of this question the Arbitrator concludes that the Recognition Clause when considered together with the Wage Clause, the Seniority

> Clauses, and other clauses establishing standards for covered jobs and employees limits the Company's right to subcontract during the term of the Contract. The Contract sets forth standards of wages and working conditions applicable to those employees and those jobs covered by the Recognition Clause. When the contract was signed the employees in the mending room were on the covered jobs, and the Contract contemplated that work normally performed by them would continue to be so performed as long as the work was available. To allow the Company, after signing an agreement covering standards of wages and conditions for mending room jobs and employees, to lay off employees and transfer the work to employees not covered by the agreed standards would subvert the Contract and destroy the meaning of the collective bargaining relation."

As is frequently true, neither extreme position ultimately prevailed. Most arbitrators applied the rule of reasonableness to the Company's action. This was for the reason that neither the Management Rights provision nor the Recognition, Seniority, and Wage provisions were found to intend an absolute right in all cases to subcontract, nor an absolute proscription in all cases against such right. As was stated by Saul Wallen, one of the most noted and respected arbitrators in the profession:[6]

> "For when pressed, it is the rare management that claims an *unlimited* right to contract out."

Wallen went on to give, as an example, that management would agree that it could not on one hand contract with the Union, and then subcontract to supply the employer with all its production workers at a lesser wage rate. To allow the employer to do so and thereby subvert the contract, while holding the Union to its agreement not to strike, destroys the mutuality

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[6] Industrial and Labor Relations Review 1966, Page 265.

upon which any contract is based. That is to say that a labor contract loses all efficacy where one side is bound and the other is not.

On the other hand Wallen concludes that neither is there a blanket restriction on management's right to subcontract in all cases. He gives as an example management's lack of equipment to do the job, or where management is confronted with an emergency, both necessitating subcontracting. In both cases, a right to subcontract has to be implied from the Management Right provision.

These examples serve to establish the principle that management's right to subcontract is qualified by a *standard of reasonableness* given the particular circumstances at hand. Such rule has been set forth as follows in the case of *Shenango Valley Water Company,* 53 LA 741, 744, 745 (McDermott, 1969):

> "In the absence of contractual language relating to contracting out of work, the general arbitration rule is that management has the right to contract out work as long as the action is performed in good faith, *it represents a reasonable business decision, it does not result in subversion of the labor agreement, and it does not have the effect of seriously weakening the bargaining unit or important parts of it.* This general right to contract out may be expanded or restricted by specific contractual language." (Emphasis supplied)

Various noted arbitrators have surveyed arbitral jurisprudence to ascertain the majority thinking on the subject of subcontracting. In the leading article on the subject entitled "The Arbitration of Disputes over Subcontracting",[7] Donald A. Crawford stated as follows:

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[7] 13 NAA 1969, Page 51

"(1) . . . most contracting out is not a present threat to the scope of the bargaining unit

(2) The recognition (provision) and contract signing do not establish a bargain that all the jobs then performed . . . should be performed by memebers of the bargaining unit."

(3) The Company cannot avoid the contract . . . cannot undermine (even unwittingly) the Union . . ." For the great preponderance of awards sustaining the union were in situations where the only apparent or stated economy of operations possible to the subject contract were lower wage rates . . ."

(4) (Not applicable herein)

(5) The arbitrator will take a long look at contracting out regular, permanent work . . ."

(6) (Not applicable herein)

Arbitrator G. Allan Dash, Jr., surveyed 64 arbitration cases from 1947 to 1959 wherein the contract was silent on subcontracting, and reported his conclusions as follows:[1]

"It may be concluded that there is *no true* adherence by arbitrators to the reserve rights of management concept in the field on contracting out." (Page 211)

In the 64 cases reviewed it was apparent that arbitrators applied the *implied limitation on the right to subcontract of the rule of reason* based upon the following factors among others:" (a) *the subcontract was dictated by efficiency and economy.* (b)

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[1] "The Arbitration of Subcontracting Disputes" Industrial and Labor Relations Review, Volume 16 (1963) Page 209-215; 33 LAW 942

the subcontract was in conformance with past practice (c) *the subcontract was not unreasonable.* (d) *the subcontract did not result in layoffs of the bargaining unit."* (Emphasis supplied)

In an addendum to Dash's review, Arbitrator Marsha L. Greenbaum reviewed 50 succeeding arbitration cases wherein the contractor was silent as to subcontracting, from 1959 to 1962.[9] She noted a proliferation of such cases as Dash found only 64 in a 12 year period and she found 50 in a 3 year period.

Greenbaum found the most common implied limitation on management's right to subcontract was: "the act (subcontract) was dictated by requirements of the business, *for efficiency, for economy,* or for expeditious performance." (Emphasis supplied)

Greenbaum continued, "a large majority of arbitrators ruled that the contracting out was not a violation of the recognition, seniority and/or job classification provisions of the agreement . . . The rationale for such conclusion is that these provisions are not to be interpreted as implying a *guarantee* of employment for the duration of the agreement." (Page 227)

As to the criterion of the subcontracting at achieve lower wage rates, Greenbaum noted that she found only 4 cases on such specific issue, and therefore, reached no conclusion. She pointed out the ultimate question involved as follows:

> "The real question is how arbitrators will interpret a reasonable business decision, good faith, and intent to undermine the bargaining unit. A reasonable business decision implied contracting out for purposes of economy and effciency . . . is contracting out to take advantage of a sub-

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[9] Industrial and Labor Relations Review, Volume 16, (1963) Pages 2, 21-34.

contractor's lower wage rate a part of economy (or is it) intent to undermine the Union?"

Finally, Greenbaum observed that the arbitrator *may consider the number of layoffs which occurred* as a result of the subcontract. (Page 234)

Union Cases

The Union herein has cited a number of cases in support of the above implied reasonableness theory. In the case of *Gulf Oil Corporation,* 33 LA 852 (Donald A. Crawford, 1959) the employer subcontracted the work of 2 Janitor-Maintenance employees. The Management Rights provision contained a right to "layoff for industrial or economic reasons", and the usual union recognition provision.

The employer argued that its cost for the subcontract was $405.00 per month whereas the cost of employment of two (2) janitor employees was $895.00 per month. Arbitrator Crawford, in upholding the union, stated as follows:

> "But Paragraph 51 cannot be interpreted as giving the Company the right to remove work form the contractually established bargaining unit on the basis of the bald proposition that the work can be done more cheaply by subcontracting it to other workers than by having it done at the contract rate . . . For if the Company can subcontract a bargaining unit job whenever it can be done at less than Union rates, the Union is faced with the impossible alternative of having the work concerning which it has bargained with the Company removed from the bargaining unit or agreeing to the performance of the job by its members at less than the agreed upon contract rates." (Id. at 855)

In the case of *Mead Corporation,* 62 LA 1000, (bothwell, 1973) the contract recited in its management rights provision that the employer had the right to

> ". . . establish, eliminate, change or introduce new or improved production methods, reasonable standards of facilities; and the right to determine the existence of crews. All other rights not specifically nullified by this agreement are retained by the Company."

The contract also included the usual recognition provision. Arbitrator Bothwell agreed that there was an *implied limitation of reasonableness* on management's right to subcontract as above set forth, and stated as follows:

> "If the contract is silent on subcontracting management generally has considerable freedom to contract out work, services or parts, provided the subcontracting is dictated by the requirements of the business, *for efficiency or expeditious performance, if there is no intent to undermine the bargaining unit, if it will not deprive a substantial number of employees covered by the agreement of employment, and if the purpose is not to secure the performance of work at lower wages.* Arbitrators have generally sustained the right of employers to contract out with these limitations, and provided that there was a good faith exercise of management functions in the matter." (Page 1005) (Emphasis supplied)

Then Arbitrator Bothwell turned "to the crucial question of wage rates." He found that the subcontractor's wage rates were substantially lower than those paid by the Company for the same work of employees laid off as a result of said subcontract. he stated:

> "A review of arbitration awards indicates that arbitrators have almost invariable held subcontracting to be improper when it results in the layoff of employees, *if the work contracted out is done by the same methods at wage rates which are substantially less than those negotiated by the union* . . . The employer cannot negotiate wage rates for

> certain work and then subcontract the identical work to be performed at wage rates substantially below those negotiated, at least, not without bargaining with the Union. This is a violation of the wage provisions of the Agreement." (Pages 1005-1006) (Emphasis supplied)

In Champion Papers Company, 41 LA 997 (Volz, 1968), the labor agreement did, as distinguished from *Gulf Oil* and *Mead Corp.*, supra, specifically address the subject of subcontracting. The contract gave the Company such right on condition that various specified "factors have been carefully considered, including but not limited to:

> "33.01 It is agreed that no maintenance work or service functions normally performed by Maintenance Department employees or appropriate service type department employees prior to this contract will be done within the plant by outside contracting services until all factors have been carefully considered including but not limited to: . . . . . (6) Petinent cost factors."

The contract also recited as follows:

> "33.05 The Company agrees that it will not use outside contracting services for the sole purpose of undermining the status of the bargaining agent."

The subcontract resulted in no layoffs of employees and a savings of $22,826.00 to the company over a three (3) year period. Arbitrator Volz proceeded to balance the cost savings to the company against the detriment to the bargaining unit. He stated:

> "Under the sixth factor in Section 33.01 - Pertinent cost factors, it is insufficient for the Company to show that the subcontracting out of work normally performed by service type department employees will result in some cost savings. *The savings must be so substantial as to offset the injury to*

> *the employees affected and any detriment to the bargaining unit.* For the reasons hereinafter stated, the Arbitrator must find that in the instant case they do not do so. Arbitrators generally hold that subcontracting of work normally performed by members of the bargaining unit is not permissable merely because it can be done at a cheaper rate. See *Bendix Corp.*, 41 LA 905 (Warns, 1963); *Sealtest Foods,* 48 LA 797 (Valtin, 1966)" (Page 1001) (Emphasis supplied)

He found for the union, even though no layoffs were involved, stating that the subcontract "eliminated one truck drivers job; that it has caused the reassignment of (1 employee) . . . and delayed the promotion of (another employee)." He added, "even though more than 1900 employees remain in the bargaining unit, these losses cannot be regarded as de minimis, particularly in view of the precedent which would be established."

In the case of Simplex Wire and Cable Company, 41 LA 237 (Wallen, 1962) the arbitrator found no specific limitation on the company's right to subcontract, but did find an implied limitation as follows:

> "Turning then to the second question, I find that there is an implied limitation in this contract on the right to farm out work under certain circumstances. The Agreement assuredly contains no specific ban on the contracting out of work. Nor does it contain specific authorization for it. But its specific provisions do not imply either that such right to let out work as is resident in the contract's terms is unlimited or that such limitations as may be inferred from its terms is all-inclusive." (Page 240)

Wallen further found that such implied limitation proscribed management's right to subcontract if the employer's dominant motive was solely to achieve economic benefits based on the subcontractor's payment of lesser wages:

> "But it does not follow that all contracting out is therefore permitted by the Agreement. Contracting out in *which the dominant motive is the re-by a* (sic) *contractor's people in order to reap the benefit of wages below the contract scale for the same work and in which the result is the diminution of status or the layoff of bargaining unit people, is a negation of one of the basic purposes of the Agreement between these parties.* That purpose is placement of bargaining unit people to set the terms and conditions to govern wages and fringe benefits to be paid for the performance of in-plant production and maintenance duties. *When the Company gets someone else who pays his employees less than scale for the same work (and when that is the major consideration in letting out the work),* and when he then tells his employees "we have no work, or only lesser paying work for you" he violates the agreement by frustrating it and negating one of its basic purposes." (Page 240) (Emphasis supplied)

Wallen ultimately held for the company on the basis that none of the bargaining unit employees were laid off as a result of the subcontract.

In the case of *Wyman-Gordon Company,* 57 LA 689, (Hogan, 1971) 5 employees were laid off out of 1100 in the bargaining unit as a result of a subcontract. The contract *specifically addressed* the subject of subcontracting as follows:

> "Article IV. Sub-contracting, Section 1. The parties have existing rights and obligations with respect to various types of contracting out: A. Maintenance and service work customarily performed by employees shall not be subcontracted while active employees capable of performing this work are being scheduled for less than a forth (40) hour week." (Page 690)

The contract also included a Management's Rights, Recognition and Wage and Seniority provision.

Arbitrator Hogan based his decision foresquare on the particular phraseology set forth in Article IV above by holding that the act of subcontracting caused the five employees to become "inactive" (laid off).

But Arbitrator Hogan added:

> "*The contract is the result of a struggle and bargain over 'economy'. The employer wants to get the work done cheaper. The Union wants more money. The contract settles that struggle for its term.* It established the wages and conditions for those jobs and employees covered by the Recognition clause. Having agreed on these terms the Company may not pull the covered work out from under the bargain, for reasons of economy and good faith. To rule that it can, would render the whole contract meaningless since Managements almost always act in good faith, i.e. the reasons are valid from Management's point of view." *Id.* at 691 (Emphasis added)

In *Fairbanks, Morse and Company,* 33 LA 55 (Phelps) the contract was silent as to subcontracting. Yet the arbitrator found that the Company's right to subcontract was circumscribed by three criteria as follows:

> "In the absence of a specific provision in the Agreement limiting or extending its prerogative in this respect, the Company has full freedom to subcontract, providing that it does so in good faith, for legitimate business reasons, and the action taken does not prejudice the employment or earnings of the members of the Bargaining Unit."

The Arbitrator went on to find that the Company did subcontract in good faith and for legitimate business reasons, but failed by the above third test stating as follows:

> "In the present case, I find that the subcontracting of waste removal was for a legitimate business reason and was

> done in good faith, but fails by the third test. It resulted in a down-grade and loss of earnings on the part of a long-service employee; and it reduced the number of jobs in the Bargaining Unit, thereby limiting job opportunities of those presently employed and prejudicing the rehire opportunities of employees on general layoff from the Bargaining Unit."

Arbitrator Phelps decision in effect upheld the *balancing of interest theory,* i.e., good faith and legitimate business interest of the Company weighed against the damage to the bargaining unit.

In the case of Consolidated Aluminum Company, 66 LA 1110 (Boals, 1976) the contract did contain an express right to the company "to subcontract work so long as it is not done for the purpose of depriving the bargaining unit employees of bargaining unit work." Eight bargaining unit members were on lay-off when the company subcontracted their work. The Arbitrator held for the Union that:

> "Although the Company decision met the general tests of "reasonableness", the injuries done to the workers plus the potential damage to the Union are more paramount and tend to make the decision not strictly reasonable in the absence of adequate consultation with the Union."

Summary Of Precedent
Supporting The Union Position

1. Management does not have an *abolute* right to subcontract based on any reserved right in the Management Rights Provision. (Dash survey, supra) 2. The Union does not have an implied and *unlimited* right to prevent management from subcontracting based upon the Recognition, Seniority, and Wage provisions in the contract. (Crawford and Greenbaum, supra) 3. Management has a limited right to subcontract based upon the reasonableness of its action.

(a) The reasonablenes of Managements subcontracting action depends upon *both* the efficiencies and economies effected by the subcontract, and upon measuring the impact upon the bargaining unit, i.e., *a balancing of the interests of both parties.* (Shenango, Champion Papers, Fairbanks, Mead Corporation, Greenbaum and Dash survey, supra)

(4) The lower wage rates of the subcontractor will be considered as a factor bearing upon the reasonableness of Managements decision to subcontract. (Greenbaum and Crawford survey; Gulf Oil, Mead Corporation, Simplex Wire, supra) (5) Even where a contract specifically allows subcontracting to achieve cost savings, a balancing of interest is inferred, i.e., cost savings to the employer weighed against injury (lay-offs) to the bargaining unit. (Champion Papers, Consolidated Aluminum, supra)

Company Cases

The Company strenuously asserts that the Union cases are, in the main, inapplicable for the reason that the subject contract does contain a specific provision appertaining to subcontracting. (Subsection 10A above) The distinction is that in the subject contract the Company is given a bald and direct right to subcontract and is only limited by a showing of (a) efficiency and economy, (b) proof of no discrimination against the Union.

In support of such distinction as to silent contacts versus contracts expressly addressing the issue of subcontracting, the Company relies on the case of Electric Storage Battery Company, 44 LA 782 (Koven, 1951) wherein the contract specifically provided:

"Article XII, Section 3:

The Company agrees not to contract out work which is normally performed by the employees, unless in the opinion of the Company the work can be performed more

> *economically and expeditiously* otherwise. If such contracting out of work will *result in the lay-off* of other than probationary employees the matter will be discussed with the Union prior to action being taken by the Company." (Emphasis supplied) (Page 782)

A janitor job was subcontracted at $287.00 per month against $420.00 per month paid to the bargaining unit employee. Also involved therein was evidence that the Company saved investment in an expensive cleaning machine. In addition the subcontractor goes over the entire plant at night, while the bargaining unit employee only cleaned a portion each day. Thereby, the subcontractor achieved greater *efficiency*. Arbitrator Koven, in holding with the Company, concluded that the cost saving was not the only factor relied on by the Company in deciding to subcontract, and stated as follows:

> "In arguing that the Company acted improperly the Union argues that a differential in cost saving is not sufficient to justify the sub-contracting that health and safety considerations require a daytime janitor who can keep the area free of lead dust; and that if night-time work is favored by the Company, a covered employee can do this night-time work.
>
> These arguments are not strong enough to prove that the Company did not act in good faith when it sub-contracted the janitor job since cost, manpower and equipment requirements, health factors, and *relative efficiency of night-time work were considered in arriving at the decision to subcontract that work.*" (Page 785) (Emphasis supplied)

Thereby, Koven found that the Company conformed to the contractual requirements of greater economy and more expeditious performance of work.

As to the distinction between a silent and expressed contract on the subject of subcontracting, Koven stated, in answer to the Union's argument that the implied rule of reasonableness and the balancing of interests should apply, as follows:

> "The Union contends that application of these standards in this case requires a finding in its favor, and in support has provided the Arbitrator with case authority. *However, in every instance those citations involved contracts that were silent on the question of the Company's right to subcontract.*
>
> *In this case we have a Contract which specifically permits sub-contracting."* (Page 784-5) (Emphasis supplied)

It is important to note that Arbitrator Koven rejected the Union's argument that, in effect, the simple application of the "good faith" test (efficiency and economy) would allow the Company unlimited right to subcontract. Koven based his decision foresquare on the "clear" language of the contract allowing the employer to subcontract if based on economy and efficiency, and allowing lay-offs in respect to said subcontracting. Thereby, Koven inferentially rejected any question of balancing of interest or reasonableness of the Company's decision. *Of significant import is the fact that in this case, the contract expressly allowed lay-offs in the event of subcontracting.*

In the case of *Laclede Gas Company,* 67 LA 461 (David, 1976) the specific contract provision bearing upon the right to subcontract recited as follows:

> "The Company and the Union agree that they will in good faith discuss any proposal for contracting or sending out work of classes that has been done by its present employees where they are qualified to perform such work." (Page 462)

The Union argued the implied limitations theory, i.e., that the recognition, seniority, and wage provisions *implied a limitation of reasonableness and non-impairment of the bargaining unit on the Company's right to subcontract.* The Arbitrator disagreed with the Union differentiating between a contract silent on the subject of subcontracting and one dealing specifically with the subject:

> "When a contract contains a bargained provision which refers specifically to the exact situation raised by an issue between the parties, it is that particular provision which must govern the determination of a dispute between them. In the present case just such a situation exists-the issue concerns contracting out and there is a specific clause in the agreement which relates specifically to contracting out." (Page 46)

The Arbitrator found that the contract provision cited above gave the Company unlimited right to subcontract subject only to "discussion" with the Union.

As to the subject of a company economizing by contracting out to a subcontractor who paid less wages, the Company herein emphasizes that where such prohibition is involved, the parties have specifically stated same. In this connection it cites *Stevens Construction Company,* 52 LA 1013 (Yaffe, 1969). Therein the contract provided as follows:

> "Article IV Subcontracting
>
> Section 1. The Employer agrees that, when subletting or contracting out work covered by this Agreement which is to be preformed within the geographical coverage of this Agreement at the site of the construction alteration, painting, or repair of a building, structure or other work, he will sublet or contract out such work only to a subcontractor who has signed or is covered by a written labor agreement entered into with the Union which labor agreement

> shall provide for economic benefits not less, and contain other terms and conditions nor more favorable to an employer, than those established by this Agreement." (Page 1014)

Arbitrator Yaffe held that the Company specifically violated the clear provision of the contract by contracting with a subcontractor not covered by an agreement with the Union.

In the case of the *City of Milwaukee,* 59 LA 537 (Mueller, 1972) the contract recited that the employer had the right to subcontract "where it is economical for the City employees to perform (the) work"; *but specifically stated that the subcontract was prohibited if "the economies (were) based upon the wage rates of the employees of the contractor or subcontractor."* (Page 539)

Arbitrator Mueller stated:

> "The inclusion of the specific language as found in this contract is clear evidence that the parties recognized and acknowledged each other legitimate aims and purposes, and as a result agreed to the language found in the contract which in fact recognized and preserves the rights of each." (Page 544)

In Holub Iron and Steel Company, 36 LA 106 (Dworkin, 1961) the contract was *silent* as to subcontracting. The Arbitrator found a substantial economic reason for the employers act of subcontracting, and accordingly found such action was in good faith. No attempt was made to apply the balancing of interests doctrine or principal of reasonableness. The Arbitrator found that the right to subcontract was inherent in the Management Rights provision and could not be proscribed.[10]

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[10]It is significant that only one bargaining unit employee lost his job as a result of the subcontract in this case.

In *C.G. Conn, Ltd.* 56 LA 1145 (Sembower, 1971) a memorandum of Agreement recited as follows:

> "The Company has the right to subcontract any work normally performed by members of the bargaining unit for economic or competitive reasons.
>
> It is understood that prior to any subcontracting of any work normally performed by members of the bargaining unit the Union Bargaining Committee will be notified and the Company will explain its reasons for such action. *In addition employees whose jobs are eliminated due to subcontracting will have the option of bidding and bumping, accept layoff or severance pay as outlined in Item 1 of the Supplemental Agreement.*" (Emphasis supplied)

The Company subcontracted out it's guard unit. Sembower, citing the NLRB, agreed that a guard unit was inappropriate within a Production and Maintenance bargaining unit. But, in the main the Arbitrator found that the subcontract provision *clearly* gave the Company the right to subcontract, *and to layoff employees.* He stated:

> "The sub-contracting must be for "economic or competitive reasons," and clearly it is established that the subcontract in this instance is considerably more economical and any such economical arrangement within a company's general budget has an impact upon its competitive position. This having been established, it is incumbent upon the Company to notify the Union so that it may voice any objections or suggestions, and such was done in this instance. Finally, the displaced employees must benefit from an "attrition" arrangement whereby they are accorded their full rights of bumping in line with their seniority or taking retirement. The three very senior "working guards" all appear to have availed themselves of these opportunities apparently to their individual satisfactions.

The Union's deep concern in this instance that "opening the door" to any such subcontracting as this may lead to erosion of the entire bargaining unit is sufficient to give one pause, particularly at this plant where significant reductions of force have taken place. *However, the parties appear to have built into their Letter of Agreement what they consider to be adequate safeguards against such an erosion, and accordingly the ARbitrator has no license to interfere with a sub-contracting unless the spirit and letter of the Letter of Agreement is violated. Therefore, the grievance cannot be sustained.*" (Emphasis supplied)

Summary Of Company Cases

(1) Where the contract is silent on the issue of subcontracting, the Company is only restricted by a good faith standard, i.e., a showing of economy and efficiency. (Holub Iron, supra)

(2) Where the contract expressly gives the Company such right for reasons of efficiency and economy, the test is also good faith, i.e., efficiency and economy. (Electric Storage and Laclede Gas, supra)

(3) Where the subcontractor pays lower wages than the bargaining unit, such subcontract is prohibited only if the contract so states. (Stevens Construction; City of Milwaukee, supra)

In any event, the letting out of work at cheaper rates must be the employer's dominant motive. (Simplex Wire, supra)

Conclusion As To Arbitral Precedent And Intent Of The Subject Contract Provision

The Union cases in the survey of predominant arbitral precedent stress a *balancing* between the legitimate interests of the Company in efficiency and economy, and the equally legitimate

interests of the Union in the maintenance of the bargaining unit. I agree that such is the test insofar as the subject contract provision is concerned. If all that has to be proved by the Company in the subject case is good faith, i.e., a showing of efficiency and economy, the bargaining unit can be completely destroyed by the Company's finding a subcontractor that is more efficient and economical to produce the work product. As significantly stated by Saul Wallen, supra, no company can make such an unlimited claim; nor conversely can a union claim that under no circumstances can a company subcontract. On the one hand the employer cannot subcontract with a bargaining unit one day for certain wages and benefits and the next day or year convey all or a substantial part of the bargaining unit work to a subcontractor. Conversely, neither can the union prevent subcontracting in cases of a need for excessive capital expenditure to meet new technology or in emergency situations or in situations where no significant impact on the bargaining unit ensues.

It may be conceded that it is a rare management that cannot justify a subcontract decision on the basis of greater economy, i.e., good faith. Such economy can almost always be found as, in fact, it is usually the main reason to subcontract. As was stated by the Arbitrator in *Wyman Gordon,* supra:

> "Having agreed on these terms the Company may not pull the covered work out from under the bargain, for reasons of economy and good faith. To rule that it can, would render the whole contract meaningless since managements always act in good faith, i.e., the reasons are valid from management's point of view."

However, as stated in the Union cases and arbitral surveys, such simple conclusion as to good faith and achievement of economy and efficiency cannot govern in a subcontracting case. *Accordingly, whether written, as in the subject contract, or implied, a provision giving the Company the right to subcontract*

for efficiency and economy cannot be read literally for the reason that to do so leads to a nonsensical result, i.e., the ability for economic reasons to destroy the bargaining unit.

An example of an unreasonable result obtained by a literal interpretation of Subsection 10 A. to allow the Company unlimited right to subcontract for economic reasons is where the Company's subcontract results in a minimal cost saving against the layoff of 50% of the bargaining unit. Yet a *literal reading* of Subsection 10 A. would lead to such an untoward result. If reasonable people would agree that such conclusion should not obtain, *then the principle of qualification of Subsection 10 A. by a rule of reason has to be admitted.*

Thke fact that the parties have here expressly dealt with the subcontract issue can give the Company no greater rights to an unreasonable construction of Subsection 10 A. than if the contract was silent on the subject. Therefore, I am persuaded that the Company's cases such as Hollub, G.C. Conn, Electric Storage Battery, supra are not controlling. As previously noted in both the G.C. Conn and Electric Storage Battery cases the contract expressly gave the *Company the right to lay-off bargaining unit members in the event of subcontracting subject only to discussion with the Union.* As such, the provisions in these cases are to be distinguished from the subject contract. *What has to be emphasized is that each express provision has to be interpreted based on the particular phraseology used.*

It should be noted that the Champion Paper case, supra did have an express provision giving the employer the right to subcontract subject to consideration of cost. (Similar to the subject contracts use of the word "economically".) Yet Arbitrator Volz therein still found that the cost "savings must be so substantial as to offset the injury to the bargaining unit," i.e., the "balancing theory."

The point being emphasized is that express provisions relative to subcontracting, such as Electric Battery Storage, G.C. Conn, and Consolidated Aluminum, supra, *do control over implied rights but only insofar as these provisions add to, vary, or subtract from such appied rights. Where, as here, the express provision goes no further than to reiterate and codify what is recognized as implied, i.e., the employer may subcontract for efficiency and economy, then such express provision adds nothing to the Company's inherent and implied rights. But such implied rights are subject to balance against the Union interests.*

It is not unusual for parties to expressly codify previous unwritten implied rights such as, for example, past practices. By doing so the parties lessen the possibility of future disputes over such unwritten rights and obligations. *Where the viability of the entire bargaining unit is at stake, as in a subcontract provision, I am of the view that such provision has to expressly and clearly spell out the employer's right to lay-off employees as in Electric Storage Battery and G.C. Conn, Ltd., supra.* Absent such clear mandate, the subject provision is to be interpreted as giving the Company a reasonable right to subcontract wherein balancing of interests must be considered.

The Company, however, argues that the lay-off and bumping procedure (Article 2, Subsection 15) read together with Subsection 10 A. gives it the right to lay-off due to subcontracting. I am not persuaded that the lay-off and bumping provision involved in the subject contract, common as it is to most labor contracts, bears in any way on the subcontract provision. As stated, if the literal application of Subsection 10A. can result in effectively destroying the bargaining unit, there will be few, if any, jobs remaining in the bargaining unit to be bumped. I find that Subsection 10 A. and Article 2, Subsection 15 are not intended to be read together to gain the inference that the Company has the right to subcontract notwithstanding the number of lay-offs that result. *The right to lay-off in subcontracting*

provisions should be clear, as aforestated, and not left to strained inference.

I am cognizant and sensitive of my duty to follow the literal intent of a labor contract. The Company emphasizes that the words used in Subsection 10 A. are clear and direct giving to it the "exclusive" right to subcontract subject only to a showing of efficiency and economy. *However, where, as previously stated, the result of such literal interpretation of a contract leads to a wholly nonsensical result, it cannot be presumed that the parties intended such a result.* Where such untoward result obtains, usual and basic rules governing contract interpretation mandate that all such provisions are subject to the rule of reason.

An analogy may be drawn to the just cause provision in a contract. Historically there is an implied limitation of just cause relative to management's right to discipline. Such implied limitation has always included the right of an arbitrator to reduce the disciplinary penalty if found to be unreasonable and arbitrary. Accordingly, where just cause is expressly written in the contract, but nothing is expressed as to the arbitrator's right to reduce a disciplinary penalty, can it be argued that the express provision contains less substance than the implied provision. Yet, if read and enforced *literally* such express provision does not give the arbitrator the power to reduce a discipline penalty.

To analogize to the subject issue, predominant arbitral precedent impliedly qualifies management right to subcontract for reasons of efficiency and economy by a rule of reason and balancing of interests, i.e., the impact on the bargaining unit compared to the cost savings and efficiency inuring to the employer. Where, as here, such implied and qualified right is codified in the contract, by an express provision, such express provision cannot be read as having less substance than the former implied condition.

Arbitrator Peter Seitz dealt with the issue of too literally reading a contract provision so as to ignore its reasonable intent in the Sperry RAnd Corporation, 46 LA 961 (1966). In that case the company subjected female employees to a physical examination to determine their fitness to fill janitor and stockman jobs, and did not impose a similar condition on male employees. The Union claimed that the company discriminated against the female employees in violation of the contract which contained an absolute and literal proscription against discrimination. Arbitrator Seitz noted that "any difference in treatment involves a discriminatory act." He held that such "discrimination", however, was not intended to be proscribed by the contract for the reason that such "discrimination" was for a rational reason. Seitz stated as follows:

> "In other words-and properly read and considered, this is not a contradiction of terms - he must determine whether the alleged "discrimination" is a reasonable one. The literalists might claim that this vitiates the anti-discrimination clause. I do not think it does. To the contrary, a reasonable interpretation in the light of its objectives will give it flexibility and strength."

As to why the arbitrator did not *literally* follow the anti-discrimination provision, Seitz stated as follows:

> "It is not difficult to make an ass of the law by a too literal reading of words used by the parties in expressing their bargain. There are many unexpressed and unarticulated undertakings in agreements; and the requirement that the parties deal in good faith. This is an ancient rule in the construction of agreements and too firmly established in our systems of decision-making to require extended documentation or discussion here."

Interestingly enough Seitz also applied a twist to the subject arbitrator's analogy to the just cause provision in a labor con-

tract. He put the example of a contract stating only that discipline be for "clause" rather than "just cause", and the employer arguing that, hence, it only has a duty to show "a cause sufficient to satisfy the criteria applied by the company" rather than having to show reasonable or just cause. Seitz stated:

> Is there any doubt that the test to be applied by an arbitrator is whether the Company had proper, just, good or reasonable cause to discipline or discharge an employee? Surely, the Company could not successfully defend a discharge before an arbitrator claiming that its cause for discharge could be arbitrary, capricious or willful; or that it need only be a cause sufficient to satisfy the criteria applied by the Company rather than a cause that would appeal to a reasonable person."

See also Martin Company, 49 LA 255 (McCoy, 1967) where the issue was interpretation of a back wage award provision as follows:

> "(b) Any claim or award for back wages under this Agreement shall be less any unemployment benefits, "extended layoff benefits or other compensation for personal services received from any source during the period in question."

It appears that grievant therein had a "moonlighting" job while working for the employer. The company argued that the *literal* interpretation of the above provision mandated deduction of earnings therefrom. McCoy disagreed stating:

> "It also calls attention to Article IX (c), prohibiting the arbitrator from subtracting from, modifying, or amending the Agreement. Of course I have no such power, *but I do have power to interpret the Agreement.* That is expressly provided for in the same provision, Article IX (c). (Emphasis Supplied)

> It is the Company's argument that compensation received by the Grievant from his "moonlighting" job with Latrobe Homes must be deducted from back wages under Article VII, Section 5 (b). This argument has the support, perhaps of a literal reading of the provision. But the obvious intent of the provision must be considered. Read literally, and disregarding obvious intent, if X - had been laid off from his Latrobe Homes job and had received unemployment benefits because of that layoff, those payments would also be deductible from the back pay due from Martin Company. Or if a man has a hobby making small things in his basement work-shop for an hour or two a day on orders from his friends, and on discharge continues that hobby, the proceeds from such sales would be deductible from back pay. Or so with a 2 or 3 hour an evening baby-sitting job to earn an extra dollar or two a day. Such deductions could not have been intended by the Parties."

Thereby, in the Martin case it is also clear that Arbitrators will not *literally* interpret a contract provision that leads to a clear nonsensical result so untoward as to force the conclusion that the parties could not have intended such result.

The rationale underlying Sperry Rand and Martin Company, supra, is that the Arbitrator's primary duty is to *interpret* an agreement so as to arrive at the *intent* of the parties. Accordingly, the Arbitrator does not sit as an automaton merely to stamp the imprimatur of legitimacy on a provision that can, if literally interpreted, lead to a nonsensical result. The only caveat that should be considered is that an Arbitrator should not easily toy with the literal phraseology used by the parties, but should reserve such approach to those instances described above.

Accordingly, since a literal interpretation of Subsection 10 A. can result in the destruction of the bargaining unit, it cannot be

so read. The standard of reasonableness and balancing of interests must prevail. Hence, it is necessary to examine the efficiency and economic benefits accruing to the Company, and balancing same against the impact on the bargaining unit.

Did The Subcontract Result In More Efficiency And Economy

At a meeting with the Company's representatives, GLS represented it could increase the total dollars of MA sales at a lower cost per dollar of MA sales through various means designed to make its mode of operation more efficient than Sears'. More particularly, GLS estimated that by the fourth month of its initial operations it could match Sears' sales performance and thereafter improve upon that performance so that, by the end of the first year, it would be sellin 140% of what Sears had sold that same month in the prior year. (Co. Ex. 10, Exhibit A; Tr. 196-198). The proposal also projected that this increased volume could be achieved at a "cost savings to Sears of at least 15% of the cost per dollar of MA sales ..." (Co. Ex. 10 E.) GLS' projections were premised, *inter alia,* on the following three factors, each of which represented a significantly more efficient means of handling MA sales from the method customarily utilized by Sears: (1) computerization of many clerical functions;[11] (2) scheduling sales personnel at the most productive

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[11]As Lynn noted in his observation of the Sears' MA operation, Sears MA sales and associated clerical personnel spent a substantial proportion of their time performing clerical responsibilities. This not only detracted from the selling time of MA sales employees but represented a substantial cost factor which, as Lynn recognized, could be eliminated through computerization. While Scavone had previously indentified this inefficiency himself, he was unable to correct it because of the already existing burden on the Company's central computer in Columbus, Ohio, which serviced the entire midwest territory. (Tr. 301)

selling hours during the day;[12] and, (3) exclusive use of part-time sales personnel.

Other efficiences were anticipated, as Lynn also explained, based upon GLS' superior sales training methods,[13] its removal of the sales function into separate modern offices[14] and by removing all clerical responsibilities from sales personnel. As an initial proposal, GLS proposed as compensation for its service a flat fee of 24.85% of all maintenance agreement sales generated. (Tr. 198; Co. Ex. 10). This quoted price was made by Lynn without regard to Sears' costs - in fact, Gracious Lady did not even know what it cost Sears to generate maintenance agreement sales. (Tr. 204). Neither the subject of Sears' contractual rates nor GLS' anticipated wages were discussed. (Tr. 206)

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[12]As Lynn testified, the prime MA selling hours are between 9:00 A.M. and 1:00 P.M. and 5:00 P.M. and 9:00 P.M. (Tr. 201) Because Sears' national employment policies precluded utilizing Sears' full-time personnel on a split-shift basis, Sears' full-timers had considerable "dead time" which they used to perform clerical and other non-sales duties. (Tr. 299). GLS, in contrast, proposed to use an exclusively part-time work force during "peak" selling hours, thus eliminating that dead time.

[13]Elsie House is responsible for establishing and implementing nationwide training programs. Over the years GLS has spent a lot of money in developing special training programs which take into account the various services to be provided and the geographic market in which GLS is working. (Tr. 181)

[14]Sears' MA sales force were housed in the warehouse complex along with drivers, warehousemen and installation clericals and were subjected to constant distractions not conducive to effective selling. GLS, in contrast, proposed to open three modern offices at strategic locations in the Detroit area, where the functions would be limited exclusively to sales and where there would be no distractions to interfere with the sales personnel's work.

Following this meeting, Scavone conducted his own cost and productivity analysis both to assess the cost savings to Sears of GLS's proposal and to determine whether Sears, through means available to it, could reduce its own costs and thus avoid the need for subcontracting.

Scavone's initial analysis revealed, first, that its own costs for performing the MA sales function was 29.66% (i.e., 29 cents for each dollar sale of MA's), exclusive of rent and utilities, as compared to GLS' proposal of 24.85%. Thus, even under GLS' opening proposal, it appeared that Sears could significantly reduce its costs through subcontracting.

After reviewing the GLS proposal, Sears resumed discussions with GLS in August and September, 1978, which resulted in a proposal from GLS to reduce its fee to 19.5% on all net sales, up to the amount of sales generated by Sears in the prior years and 20.5% on any net sales beyond the midpoint of the prior year's sales. Based on this revised cost proposal, Scavone did a second and more detailed analysis of Sears' cost (Co. Ex. 22) which revealed that it cost Sears 31.58% of total maintenance agreement sales revenues by utilizing Sears personnel. Therefore, with Gracious Lady, the cost factor was reduced to from 19.5% of total sales if Gracious Lady sold the same amount of maintenance agreements to 24.62% of total sales if Gracious Lady doubled Sears' sales. Based on past sales history, Mr. Scavone anticipated that the cost would be approximately 21% of sales, or savings to Sears of one-third of its cost. (Tr. 307-308; Co. Ex. 6).[11]

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[11]It was legitimately assumed that it would be "highly unlikely" that Gracious Lady would double Sears' sales since "[Sears]' previous history is an increase [in sales] of approximately 11% over the last four years." (Co. Ex. 6).

In conjunction with this analysis, Scavone also made an in-depth productivity analysis which revealed that, due to severe absenteeism with the MA sales force, Sears had been losing a substantial amount in the potential MA sales. (Tr. 306-308, 316-317; Co. Ex. 7). Based upon that analysis (Co. Ex. 7), Scavone found that because of an extraordinary high absentee rate of 14.5%, Sears was employing the equivalent of seventy full-time employees to do the work of fifty-nine full-time equivalents.[16] This also meant, as Scavone noted, that because of this severe absentee problem Sears had lost in excess of $635,000 in potential MA sales for the seven-month period measured.[17]

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[16]As Co. Ex. 7 demonstrates, for the preceding seven months Sears' average employment level for its four MA sales units was 59.29 full-time employees and 21.51 part-time employees. This represented 70.08 full-time equivalents. However, in computing the average hours worked he found these 70.08 full-time equivalents were only working the equivalent of 59.9 persons, or, stated another way, that Sears' had the equivalent of 10.08 full-time persons on its payroll to cover for those persons not at work (over and above [absences] for vacations and holidays). (Co. Ex. 7). This represented an overall absentee rate (exclusive of vacations, holidays and long-term illnesses or disability) of 14.5%, i.e., 10.18 ÷ 70.08. This rate was later reconfirmed in a more definitive analysis of the hours actually worked from national payroll records. That analysis (Co. Ex. 23) showed that after eliminating hours not worked due to holidays, vacations, illness', long-term disability and leave earlies [employees leaving work before the end of a shift], the absentee rate for MA sales clericals was 14.42%.

[17]As shown by Co. Ex. 7, Scavone determined that, if the 10.18 full-time equivalents had been working rather than absent, an additional 1520 eight-hour days would have been worked. Based on average daily sales figures, this would have generated $635,661.00 in additional sales for the seven-month period measured. Of course, average company wide absenteeism costs should be deducted.

The Company summarizes the decision to subcontract for efficiency and economy on the fact that: (1) the Company was faced with an overall absentee rate of over 14% which resulted in considerable loss in gross sales; (2) GLS had promised to generate 35% to 40% additional sales; (3) a cost savings in the amount of ⅓ would be saved overall; (4) better service to customers would result by elimination of clerical duties of the sale staff.

I am persuaded that the Company achieved more efficiency and economy in the subcontract with GLS. As to GLS projection for increased sales of 35 to 40% by year end, (Co. Ex. 10) the bargaining unit increased sales by 11% per year for the past 4 years. (Co. Ex. 4, page 2) Accordingly, the projected increase in sales by GLS of 35 to 40% in the first year (minus the 11% increase projected for the bargaining unit) is a factor.

The Union argues that, prior to the strike, Company officials were pleased with MA sales clerks' ability to meet quotas. Various managers applauded their efforts. (Tr. 59, 60, 93; Union Ex. 8) While such expressions of approbation may have been the fact, the sales of MA Detroit compared to Chicago and cleveland suffered by comparison. While the bargaining unit employees in Detroit did perform at over 95% of sales quotas on average, absenteeism still resulted in lost sales. Thus, if an employee was absent, certain leads for sales would remain unassigned; thereby resulting in lost sales *even though assigned quotas were met.* (Tr. 283-285) Moreover, the budgets "are figured by using the sales recovery figures from the two preceding months. Therefore if sales in October were low due to an absenteeism or other inefficiencies, the December "budget" and resulting quotas would automatically be low. *Employees could therefore meet their quotas and budgets even though the Company, as here, suffered from declining sales.* (Tr. 328-329)

The Union further asserts that, after 4 months of operation, GLS was unable to reach even 70% of the sales quotas. (Union Ex. 4 and 12) In this connection, I previously ruled in my Interim Opinion that the requirement in subsection 10 B for submission of "facts and figures" intends only those at hand at the time of execution of the subcontract. Accordingly, Union Exhibits 1 through 4 inclusive are not admitted. Whether GLS exceeded sales projections as of December 14, 1978 (thereby benefiting the Company's case herein), or whether GLS sales figures after December 14, 1978 were less (thereby benefiting the Union's case herein) is beside the point. Such future result by GLS is not within the purview of subsection 10B. Further, and as stated in the Interim Opinion, "the practicalities resultant from the Union's position make unreasonable its interpretation of subsection 10B. This is for the reason that to consider future sales figures of GLS would involve an arbitrator in the constant monitoring of same through numerous and periodic ensuing grievances."[11]

As to the ½ cost savings, the MA expenses for wages were $1,082,939.00 from January 1, 1978 through March 31, 1978. (Co. Ex. 6, Page 1) A ½ saving would add approximately $366,000.00 to gross profit. This plus the added 24 to 29% projected sales increase (35 to 40% increase minus 11% average increase of the bargaining unit) estimated by GLS adds up to a substantial economic benefit. To this may be added some imponderable benefits by way of greater service to customers through a more efficient operation of GLS, i.e., elimination of clerical duties, etc.

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[11]See *Electric Storage Battery Company, supra,* wherein Arbitrator Koven concluded that the question was whether the Company acted "in good faith *when it subcontracted the janitor job* since cost, manpower and equipment requirements, health factors, and relative efficiency... were considered in arriving at the decision to subcontract that work." (E.S.)

The Lesser Wages And Benefits Paid By GLS

The Company argues that there is nothing expressly set forth in subsection 10A and B proscribing subcontracting at lesser wages. The Company cites *Stevens Construction Corporation,* 52 LA 1075 (Yaffe, 1969) as standing for the proposition that such proscription must be set forth in the contract. In the *Stevens* case the contract recited:

> "ARTICLE IV SUBCONTRACTING Section 1. The Employer agrees that, when subletting or contracting out work covered by this Agreement which is to be performed within the geographical coverage of this Agreement at the site of the construction, alteration, painting or repair of a building, structure or other work, he will sublet or contract out such work only to a subcontractor who has signed or is covered by a written labor agreement entered into with the Union which labor agreement shall provide for economic benefits not less, and contain other terms and conditions not more favorable to an employer, than those established by this Agreement." (Page 1014)

The Arbitrator held for the Union stating:

> "In addition, it is apparent from the record that the Employer made *no attempt to determine, at the time it subcontracted such work, whether or not the subcontractor had an agreement with the Union.* Having found that the work in question constituted bargaining unit work, that such work was subcontracted to a contractor who *did not* have an agreement with the Union; and furthermore, having concluded that Article IV, Section 1 of the agreement is valid and enforceable under the Section 8(e), proviso, the Arbitrator therefore, concludes that the Employer, by subcontracting bargaining unit work to T. Bakken & Son, has violated Article IV, Section 1, and en-

forceable provision of the agreement." (Emphasis Supplied) (Pages 1017-1018)

In the *City of Milwaukee,* 59 LA 537 (Mueller, 1972) the contract gave the City to right to subcontract with the following proviso:

". . . provided, however, that the economics will not be based upon the wage rates of the employees of the contractor or subcontractor, and provided it shall not be considered a layoff if the employee is transferred or given other duties at the same pay." (Page 539)

The arbitrator found that lesser wages were paid by the subcontractor and stated as follows:

". . . The inclusion of the specific language as found in this contract is clear evidence that the parties recognized and acknowledged each others legitimate aims and purposes, and as a result agreed to the language found in the contract which in fact recognizes and preserves the rights of each." (Page 544)

However, in neither the *Stevens* or the *Milwaukee* case does the arbitrator state that such proscription against paying lesser wages to subcontractor *must* be in the contract. The issue regarding a contract silent on such subject was not therein involved.

In the case of *Simplex Wire and Cable Company,* supra, Arbitrator Wallen dealt with a contract containing no subcontracting provision. He found an implied condition limiting the Employer's right to subcontract where:

"But it does not follow that all contracting out is therefore permitted by the Agreement. Contracting out in which the *dominant motive* is the reby (sic) a contractor's people in order to reap the benefit of wages below the contract scale

> for the same work and in which the result is the diminution of status or the layoff of bargaining unit people, is a negation of one of the basic purposes of the Agreement between these parties. That purpose is placement of bargaining unit people to set the terms and conditions to govern wages and fringe benefits to be paid for the performance of in-plant production and maintenance duties. When the Company gets someone else who pays his employees less than scale for the same work (and when that is the *major consideration* in letting out the work), and when he then tells his employees 'We have no work, or only lesser paying work for you' he violates the Agreement by frustrating it and negating one of its basic purposes." (Page 240) (Emphasis supplied)

Wallen concluded:

> "Thus I conclude that the contract does not leave in management's hands an unfettered right to contract out and that to the extent that a case involves the procurement of a substitute labor supply at less than contract wages and benefits and causes the Simplex people affected to accept a diminution of wages and benefits or a loss thereof by layoff, it violates the implied obligations resident in this Agreement . . . ." (Page 240)

However, since no employees were laid off, and thereby "replaced" by the subcontractor's employees earning less wages, Wallen held for the Company.

As argued by the Company, the "dominant motive" criterion set by Wallen denotes that the employer had knowledge of the lesser wage rates paid by the subcontractor.

The Union argues that prior knowledge of the employer as to wage rates of the subcontractor is not necessary. Where, as here the subcontract concerns work wherein the cost is predominant-

ly made up of wages, the employer has constructive knowledge of wage rates of the subcontractor, according to the Union.[19]

According to Donald A. Crawford in his article "The Arbitration of Disputes over Subcontracting", supra, it appears that such prior knowledge is not required. Crawford stated:

> ". . . (3) The Company cannot avoid the contract . . . cannot undermine (*even unwittingly*) the union . . ." *For the great preponderance of awards sustaining the union were in situations where the only apparent or stated economy of operations possible to the subject contract were lower wage rates* . . . (Emphasis Supplied)

See also Crawford in *Gulf Oil, supra* as follows:

> "But Paragraph 51 cannot be interpreted as giving the Company the right to remove work from the contractually established bargaining unit on the basis of the bald proposition that the work can be done more cheaply by subcontracting it to other workers than by having it done at the contract rate . . . For if the Company can subcontract a bargaining unit job whenever it can be done at less than Union rates, the Union is faced with the impossible alternatives of having the work concerning which it has bargained with the Company removed from the bargaining unit or agreeing to the performance of the job by its members at less than the agreed upon contract rates." *Id.* at 855

Arbitrator Bothwell in *Mead Corporation, supra,* held inter alia, "if the purpose is not to secure the performance of work at lower wages" subcontracting is permitted. (*Id.* page 1005) Query, does such phrase connote prior actual knowledge by the employer of such wage rates.

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[19] 90% of the cost of the MA operation was due to labor expenses. (Co. Ex. 21, Column 7)

I'm not persuaded to the Company's theory that the proscription against subcontracting for lesser wage ratas to be expressed in the contract. This is for the reason that the converse is also true, i.e., that a provision should be inserted *specifically allowing* the Company to subcontract to a contractor paying less wages. It is recalled in this connection that in *Electric Boat* and *GC Conn, supra,* the contracts *specifically* gave the employer the right to layoff as a result of a subcontract. Thereby, one could argue that the same provision specifically allows the Company to subcontract at lesser wages by inference, but I do not agree.

Also, it is very nearly impossible, from a practical standpoint, for a Union to prove that the employer had knowledge of lesser wages paid by a subcontractor. Negotiations for a subcontract are controlled by the employer. So long as the employer does not ask the question of the subcontractor as to what wages are being paid, the fact of knowledge cannot be proved. In fact, the employer usually has little interest in the wages paid by the subcontractor so long as the bottom line is a plus to the employer.

What is involved in this issue is the good faith of the employer and lack of discrimination against the union. In a heavily labor oriented service operation, wherein a subcontractor bids 1/2 below the cost of the operation to the employer, most sophisticated employers realize that the subcontractor saves money by paying lower wage rates. *In my view it behooves the employer to find out these rates.*

Accordingly, the contract need not expressly proscribe subcontracting if based on lesser wage rates. (*Crawford, Mead Corp.,* and *Simplex Wire,* supra.) What is involved is the exchange of bargaining unit work for subcontract work at lesser wages which, if substantial layoffs occur, results in directly impairing the bargaining unit. That is patently discriminatory as to the bargaining unit.

The Fact As To Wages Paid By GLS

99% of all the MA Sales employees were paid $6.91 per hour. In addition they received broad fringe benefits equivalent to 15% of labor cost. Thus the hourly wage of the Union employees was $7.94 per hour. GLS employees were all part time and were paid $4.00 per hour and received no fringe benefits. (Tr. 234)

The Employer argues that, at the time of execution of the subcontract, GLS had no defined wage plan. Its sales unit was not in being at that time. It was only during the start up period and thereafter that GLS paid $4.00 per hour. During negotiations for the subcontract, GLS only had a vague idea of what it would have to pay in wages estimated at "anywhere between $3.50 and $8.00 per hour." (Tr. 206)

I am persuaded to the merits of the Company's argument in this respect. While I have found that an employer is charged with constructive notice of wage rates of the subcontractor, it carries such principle too far when the subcontractor has not yet established a wage rate. Constructive notice intends that the fact to be "noticed" is at hand and can be known. Where such fact can constructively be known, legitimate inferences can be drawn from such fact, i.e., that the employer was *motivated* to discriminate against the bargaining unit. However, no such inference can be drawn from the situation, as here, where no wages have been set by the subcontractor.

Further, it should be emphasized that the discrimination provision recites "solely to discriminate." The Company argues that the subcontractor's operation involved numerous officiencies resulting in a more economical operation other than by saving money by lower wages. Such efficiencies by GLS, as aforenoted, involve computerization of clerical functions thereby allowing for more selling time; scheduling sales personnel at the most productive selling hours; exclusive use of part

time help; more efficient and superior training methods; and removal of the sales function into seperate offices. Hence, it is apparent that, even if lower wages were paid by GLS, such fact was not the "sole" reason for discrimination against the bargaining unit.

Past Practice

The Company asserts that past practice supports its ability to subcontract in this case, sans any qualification by virtue of a balancing of interest criteria.

There were 2 prior cases of subcontracting. In the case of the load sheet and ROR subcontracting in February, 1978, the Company's "facts and figures" which were presetned to the Union consisted of an analysis of Sears costs based on wage data and cost of subcontracting pursuant to the contractor's proposal. (Tr. 248-251; Co. Ex. 13) Although not documented to the Union as it was in this case, the Company also discussed the fact that an absentee problem among the clericals performing the work also resulted in an inefficient operation. (Tr. 251-252) There, as here, employees whose jobs were eliminated were given rights under the contract's job elimination clause (Jt. Ex. 1, Art. II, Section 15; Tr. 255) The Union did not grieve the Company's action in that case.

The Union counters that in the load sheet subcontracting case no layoffs resulted. (Tr. 168-169) Further, in the load sheet case the Company did discuss alternatives with the Union. (Tr. 264)

As to subcontracting of janitorial service in the warehouse, the subcontract was for efficiency and economy. (Co. Ex. 18) Three employees were involved and were "handled under the job elimination clause of (the) contract" (Co. Ex. 18).

Past practice is defined as ongoing conduct of the parties over a sufficient period of time to warrant the conclusion that the

parties have *agreed* to an interpretation of an ambiguous contract provision. The above two isolated instances are not sufficient to prove a past practice by said definition. In no wise can these two situations be compared with the subject layoff of 12% of the bargaining unit.

Balancing Interests

I have heretofore found that subsection 10A intends the balancing of the interests of the Company in substantially achieving greater efficiency and economy with the impact on the bargaining unit. The rationale underlying such conclusion bears repeating in order to understand my ultimate conclusion herein. The right to layoff a substantial percentage of the bargaining unit has to be *clearly expressed* in the subcontracting provision else the bargaining unit can be destroyed. No subcontracting provision can be so read by implication and reference to the usual layoff and bumping provisions.

I have also found that the Company has achieved a substantial gain in a more efficient and economical operation under the GLS subcontract. The sole question remaining is whether the layoff of 90 employees representing 12% of the bargaining unit is a substantial impairment of it.

Arbitral precedent runs the gamut on the question of what percentage of layoffs is substantial enough to proscribe management's right to subcontract for efficiency and economy. As aforestated, Arbitrator Greenbaum in her article on the subject, *supra,* observed that arbitrators may consider the number of layoffs in reaching a decision. Arbitrator Bothwell in *Mead Corporation, supra* used the criteria of "a *substantial* number of employees covered by the agreement." (Emphasis Supplied) In *Sealtest Foods,* 46 LA 797 (1966) Arbitrator Rol Valtin, after subscribing to the "balancing theory" disallowed subcontracting that resulted in a layoff of 10% of the bargaining unit. (Page 802) He characterized such percentage as "substantial".

Arbitrator Volz in *Champion Papers, supra,* held what in my mind is an extreme view, that a layoff of one (1) out of 1900 employees in a bargaining unit results in disallowance of the subcontract. He emphasized that he was fearful of "the precedent which would be established" by the subcontract.

Arbitrator Wallen in *Simplex Wire, supra,* held for the Company because none of the bargaining unit employees were laid off as a result of the subcontract.

In my view a 12% layoff of the bargaining unit is substantial, and when weighed against the equally substantial economy and efficiency gained by the Company, forces the conclusion that the subcontract to GLS was not reasonable.

I have read no case wherein a 12% layoff of the bargaining unit due to subcontracting was considered insubstantial. In fact, most cases proscribe the right to subcontract wherein resultant layoffs are a much smaller percentage.

Remedy

The Company urgently requests that I not order it to re-establish the MA Sales Unit, but, at most, limit an award to providing back pay to those employees who sustained loss. The main thrust of the Company's position is that it has sustained the burden of proving that the sub-contract was made in good faith to achieve substantial economy and efficiency.

But it is readily apparent, in a sub-contracting case, that the usual reason for such action is to achieve lower costs and increased income through production or sales efficiency. That is to say that, except for reasons of bad faith and discrimination, it is a rare management that cannot support a decision to subcontract by a showing of greater economy and efficiency. (Wyman - Gordon supra) As aforestated, what is primarily involved herein is the unreasonably detrimental impact (12%) on

the bargaining unit, notwithstanding the fact the greater efficiency and economy, achieved by the Company. Accordingly, it follows that a reinstatement of the bargaining unit in the area of the sub-contract will always, in such cases, result in a forcing of the employer to continue an inefficient and uneconomical operation. Yet, as stated in Wyman - Gordon supra:

> "*The contract is the result of a struggle and bargain over 'economy'. The employer wants to get the work done cheaper. The Union wants more money. The contract settles that struggle for its term.* It established the wages and conditions for those jobs and employees covered by the Recognition clause. Having agreed on these terms the Company may not pull the covered work out from under the bargain, for reasons of economy and good faith. To rule that it can, would render the whole contract meaningless since Managements almost always act in good faith, i.e. the reasons are valid from Management's point of view." *Id.* at 691 (Emphasis added)

It may then be concluded that a collective bargaining agreement evidences the best terms available to the employer in payment of a certain bargained for efficiency of a particular bargaining unit. That some other labor force or sub-contractor can perform the same work more economically and efficiently is actually beside the point. Such is the rationale underlying the previously cited cases in support of the Union's position herein.

Next the Company asserts that an award reinstating the MA Sales Unit is punitive and in violation of Article IV sub-section 1 (Grievance Procedure) which empowers the Arbitrator to only "compensate the parties or employees covered by the Agreement for damages shown to have resulted from a misinterpretation or breech of this Agreement, but shall have no power to award exemplary or punitive damages."

I cannot agree that the above limitation to provide "damages" as a remedy precludes reinstatement of the MA Sales Unit. If such were the interpretation, then unjustly discharged employees could not be awarded reinstatement, but only back pay. In fact, "damages" can be either compensatory and/or punitive. It is only the latter that is proscribed in Article IV sub-section 1. Compensatory damages, such as back pay, is usual in arbitral awards. Accordingly, the use of the word "damages" is directed only to monetary awards, but does not preclude reinstatement of the MA Sales Unit.

Further, the Company argues that serious practical and equitable considerations preclude imposing a reinstatement award. It is pointed out that it is difficult, if not impossible, to adequately restaff the MA operation. Many of the former MA Sales Unit employees have bumped into other classifications. Since they have been occupying these positions for over a year, they may decline to return to their former positions. Moreover, reinstatement of the MA Sales Unit would have a substantial "ripple" effect throughout the entire bargaining unit. Thus, those former MA Sales employees who elect to go back to the MA Sales Unit would cause a vacancy which would trigger the bidding provisions of Article VIII.

Such argument, however, is always attendant to contract violations involving sub-contracting or violations of the layoff and recall procedure. To hold with the Company would, however, result in permanent damage to the Union insofar as it continues to suffer a substantial loss of the bargaining unit. Only reinstatement can make the Union whole.

Finally, the Company points out that it will be faced with substantial liquidated damages payable to the sub-contractor for cancellation of its agreement. (Employer exhibit 1, para. 10) Again, such liability is always attendant to the serious decision to sub-contract a substantial portion of the bargaining unit work. The Company chose, in the face of considerable arbitral

precedent, to take the gamble to sub-contract. In addition such gamble was taken in the face of Union Representative Esser's attempt on January 4, 1979 to have the Company reconsider its sub-contract decision. (TR165,400) The Company refused. When the Union presented a grievance the Company again refused to discuss alternatives to the sub-contract.

It is axiomatic that a party that pleads equity must do equity. While I have found that the Company had no contractual duty to meet and confer with the Union relative to the sub-contract, on the issue of remedy, such lack of cooperation by the Company should be taken into consideration.

The Company cites numerous NLRB and court decisions standing for the proposition that reinstatement of a sub-contracted unit is not ordered where the sub-contract was based on "sound economic reasons". (Avila Group Inc. 218 NLRB 633, 634 (1975))[20] But these cases involve adjudication of the legal issue of failure to bargain relative to sub-contracting per Fibreboard v. NLRB 379 US 203, 215-217 (1964). As such, these cases assume the absolute right of the Employer to sub-contract, conditioned only on a duty to bargain. I am, however, not involved with the law, but rather with a collective bargaining agreement. As such, I am not directed by the Company to any arbitration cases wherein the sub-contracted unit was not reinstated. On the contrary in all cases wherein a contract violation was found, the Arbitrator ordered reinstatement.[21] In summary I am not persuaded that the usual arbitration remedy of reinstatement should be foregone in this case.

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[20]Where "practical considerations" dictate against the imposition of such a "drastic remedy." - Summit Tooling 195 NLRB 479 (1972)

[21]Mead Corporation 62 LA 1000, supra
Sealtest Foods 48 LA 797, supra
Agrico Chemical Company 51 LA 997, supra
Selb Manufacturing Co v. IAM District 9; 305 Fed 2d 117 (8th Ct) enforcing Selb Manufacturing Co. 37 LA 834

As to back pay, the Employees laid off and those suffering reduction in pay as a result of the sub-contract have obviously sustained loss. As stated by Arbitrator Saul Wallen both as to reinstatement and reimbursement of monetary loss:

> "It is axiomatic that when one party is deprived by another of a right, clearly defined in the agreement, and he is thereby caused to suffer a monetary loss he is entitled not only to a reinstatement of that right but to recovery of the loss the wrongful action of the other party imposed upon him. To hold otherwise would be to give one party license to violate the agreement, whether intentionally or otherwise, on repeated occasions without any responsiblity for the losses inflicted on the other party."[32]

The Company asserts, however, that in any event, a back pay award should date from the date of the arbitrtion award. This is for the reason that, through no fault of either party, but rather due to the complexity of the issues, an inordinate time lapse has occurred.[33] I agree.

Award

The Company shall reinstate all employees in the MA Sales Unit within seventy (70) days from date of this Award so as to reconstitute said unit at the same manpower as was employed at the date of the subcontract.

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[32]The Saul Wallen Papers: A Neutral's Contribution to Industrial Peace (ed. Yaffe) P.43

[33]The arbitration hearings began in May, 1979.

The Company shall make the affected employees whole for all losses, minus outside earnings, from date of this Award to date of reinstatement.

/s/ Richard L. Kanner, Chairman

/s/ David Sommerville, Union Panel Member

/s/ Edward L. Thomas, Company Panel Member

Dated: May 29, 1980

APPENDIX C

United States District Court
Eastern District of Michigan
Southern Division

Civil Action No. 80-72597

Sears, Roebuck And Co.,
Plaintiff,

v.

Teamsters Local Union No. 243, affiliated with the
International Brotherhood Of Teamsters,
Chauffeurs, Warehousemen And Helpers Of America,
Defendant.

OPINION

The plaintiff Company filed this action under 29 U.S.C. §185 and 9 U.S.C. §10(d) to set aside the arbitration Opinion and Award of Richard L. Kanner issued on July 14, 1980. The Arbitrator found that the decision of Sears, Roebuck and Co. to subcontract the work of its Maintenance Agreement Sales Department ("MA Sales") to an outside contractor violated the collective bargaining agreement. The Arbitrator awarded reinstatement of the MA Sales Unit as well as back pay to affected employees from the date of the Award until the date of reinstatement. Both the Union and Company have filed motions for summary judgment. Sears contends that the Award should be set aside on the ground that the Arbitrator exceeded his authority in construing the contract by disregarding the plain and unambiguous contract language. Sears also contends that the remedy of reinstatement is punitive and therefore violates the contract. The Union argues that the Arbitrator was within his power in interpreting the contract the way he did, and seeks

to have his decision enforced. The Union objects, however, to the back pay remedy imposed in that it commences as of the date of the Arbitrator's Award rather than exceeding back to the effective date of the subcontract.

I.

The facts as set forth in the Arbitration Award are not in dispute. The subcontract at issue affected employees of the Maintenance Sales Department who conducted telephone sales of maintenance agreements for appliances sold by the Company. A comparison of MA Sales results from different Sears' locations between February and June of 1978 showed the Detroit operations selling less than stores in Chicago and Cleveland, resulting in an estimated loss to the Company of over $635,000 over a seven-month period. (Arbitrator Kanner's Opinion [hereafter "Opin."] at 46). Based on this information, the Detroit group manager of Sears, Larry Treutanaro, decided to explore the possibility of obtaining an outside contractor to perform the sales in a more efficient and economical manner. Shortly thereafter, he began negotiations with Service Marketing, Inc., a division of Gracious Lady Services, Inc. ("GLS").

From September 18, 1978 until November 29, 1978, the Union was engaged in a strike over a wage reopener in the contract. On December 14, 1978, approximately two weeks after the strike was settled, the Company entered into a subcontract with GLS to conduct MA Sales for Sears' Detroit group to begin on February 1, 1979. On January 4, 1979, Company representatives notified the Union's business representative, James Esser, of the Company's decision to subcontract, and on January 10, 1979 the Company provided the Union with the "facts and figures" that it relied upon in deciding to subcontract the MA Sales Department work. The Union subsequently filed a grievance claiming that the Company had violated the

collective bargaining agreement. When the subcontract was implemented on February 1, 1979, ninety employees (12% of the bargaining unit) were laid off. Under the collective bargaining agreement, the affected employees were permitted to exercise their right to bump into other classifications pursuant to the provisions of the Job Elimination clause.[1]

II.

It is well established that arbitration is a favored means of resolving labor diputes and that the courts refrain from reviewing the merits of an arbitration award. However, the Supreme Court also noted in *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), that the Arbitrator's powers are not unlimited in the resolution of labor disputes.

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's

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[1] Article II,Section 15, provides:

> A. When a job is considered eliminated by the Company, the company will allow that employe to bump into any classification of equal pay (or less) without prior experience, or any classification previously held. The Company will train the employe in this new classification.
>
> B. The employe, whose job was eliminated, would be protected for two (2) years as far as the voluntary right of recall in the event a vacancy occurs in that department and classification. Should an employe refuse recall, they have permanently waived their right to recall.
>
> C. Those employes who are bumped by employes whose job was eliminated will be handled by the lay-off procedure.

> words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. *Id.* at 597.

The U.S. Court of Appeals for the Sixth Circuit has further explained in *Detroit Coal Co.* v. *Intern. Assn. of Machinists & Aerospace Workers,* 594 F.2d 575, 579 (6th Cir. 1979), that

> [t]he arbitrator is confined to the interpretation and application of the collective bargaining agreement, and although he may construe ambiguous contract language, he is without authority to disregard or modify plain and unambiguous provisions. [citations omitted]. Furthermore, '[i]f the arbitrator's award has diviated from the plain meaning of a labor contract provision, it must find support in the contract itself or in prior practices demonstrating relaxation of the literal language.' *NF & M Corp.* v. *United Steelworkers of America,* 524 F.2d 756, 759 (3d Cir. 1975).

The collective bargaining agreement between the parties here specifically covers the subject of subcontracting, as follows:

> Article I. Recognition and Representation
>
> Section 10. A. The right to subcontract any type of work within the jurisdiction of the Union shall be vested exclusively with the Company, provided however, that such right to subcontract shall be restricted to work that can be performed more efficiently and economically outside of the bargaining unit, and no work shall be subcontracted solely to discriminate against the Union.
>
> B. The Company agrees, prior to the actual subcontracting, the Company will substantiate such action by submitting facts and figures that the work involved can be done more efficiently and economically.

In its grievance filed on January 23, 1979, the Union claimed that Sears had failed to comply with the conditions set forth in the above subcontracting provision. The grievance was submitted to arbitration before Arbitrator Richard L. Kanner under the contractual grievance procedure.[2]

In his decision issued July 14, 1980, the Arbitrator found that the three conditions imposed by Section 10(A) and (B) had been met prior to implementation of the subcontract. The arbitrator found that Sears had adequately complied with the notice provision of Section 10(B) of the contract (Opin. at 12-13), that Sears' decision was not undertaken solely to discriminate against the Union (Opin. at 15), and that Sears' decision was prompted by the "substantial gain in a more efficient and economical operation under the GLS subcontract" (Opin. at 56).

Nonetheless the Arbitrator concluded that an additional implied condition must be read into the contract, namely, that there must be a balancing of the gain in cost savings and efficiency to the employer with the resulting impact on the bargaining unit from the decision to subcontract. In this case, the Arbitrator found that the harm to the bargaining unit outweighed the benefits of Sears in economy and efficiency from the subcontract, and thus concluded that Sears had breached the collective bargaining agreement.

This case is troubling because the result of the Company's decision to subcontract is a harsh one. However, I conclude that the Arbitrator has exceeded his authority in amending the express terms of the contract between the parties. The contract specifies in Article IV, Section 1, that

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[2] Article IV of the parties' collective bargaining agreement.

> The Arbitrator ... shall have no power to alter or amend in any way the provisions of this Agreement, to imply an agreement between them as to any matters which are not covered by the specific provisions of this agreement or to substitute his judgment for that which this Agreement allows to the parties.

Having found that Sears met all the conditions of the subcontracting provisions of the collective bargaining agreement, and finding no deviation from the plain meaning of the provision in the contract itself or in prior practices[1] demonstrating relaxation of the literal language, the Arbitrator's Award does not draw its essence from the collective bargaining agreement, and therefore cannot be enforced.

The arbitrator reached the conclusion that a balancing test must be applied to evaluate the disputed subcontract for the following reasons: (1) that express subcontracting provisions control over implied rights "only insofar as these provisions add to, vary, or subtract from such applied [sic] rights," so that where, as here, the language merely codifies the Company's implied right to subcontract for efficiency and economy , a balancing test should be implied as well (Opin. at 37); (2) that a literal reading of the subcontracting provision leads to a "nonsensical result, i.e., the ability for economic reasons to destroy the bargaining unit" (Opin. at 36); and (3) that

> "[w]here the viability of the entire bargaining unit is at stake, as in a subcontract provision, ... such provision has

---

[1] The Arbitrator defined past practice as "ongoing conduct of the parties over a sufficient period of time to warrant the conclusion that the parties have agreed to an interpretation of an ambiguous contract provision." (Opin. at 56). He found that the two prior instances of subcontracting by Sears were not sufficient to establish a past practice under this definition. *Id.*

> to expressly and clearly spell out the employer's right to lay-off employees ... Absent such clear mandate, the subject provision is to be interpreted as giving the Company a reasonable right to subcontract wherein balancing of interests must be considered. (Opin. at 37-38).

None of these reasons are supported by the arbitral precedent discussed by the Arbitrator.

A distinction is drawn in arbitration cases between a contract which is silent on the subject of subcontracting and one which expressly addresses the issue. The general rule in the case of a contract which does not address the subject is to imply a limitation of reasonableness on management's right to subcontract and to invoke a balancing test. The factors involved in this balancing of interests are discussed by the arbitrator in *Mead Corporation,* 62 LA 1000 (Bothwell, 1973), in the following terms:

> If the contract is silent on subcontracting, management generally has considerable freedom to contract out work, services or parts, provided the subcontracting is dictated by the requirements of the business, for efficiency or expeditious performance, if there is no intent to undermine the bargaining unit, if it will not deprive a substantial number of employees covered by the agreement of employment, and if the purpose is not to secure the performance of work at lower wages. Arbitrators have generally sustained the right of employers to contract out with these limitations, provided that there was a good faith exercise of management functions in the matter. *Id.* at 1005.

Conversely, when the parties to a contract specifically address the subject of subcontracting, their express agreement supersedes any implied conditions. As the arbitrator in *Laclede Gas Co.,* 67 LA 461 (David, 1976), observed,

> [w]hen a contract contains a bargained provision which refers specifically to the exact situation between the parties, it is that particular provision which must govern the determination of a dispute between them. *Id.* at 464.

Similarly, the arbitrator in *Electric Storage Battery Co.*, 44 LA 782 (Koven, 1965), rejected the union's argument that a balancing theory should apply where the contract specifically addressed subcontracting. Arbitrator Koven upheld the company's decision to subcontract a janitorial job because the work could be performed more "economically and expeditiously" by the subcontractor and therefore met the contract conditions.[4]

Arbitrator Kanner's conclusion that a balancing test should be applied in this case is not supported by the arbitration cases involving express subcontracting provisions which he discusses in his Opinion. The results in those cases turn on the interpretation of the specific subcontracting language involved, and do not, with one exception, add an implied balancing test to the express agreement between the parties.[5] In the absence of any

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[4] Article XII, Section 3, of that contract provides that "The Company agrees not to contract out work which is normally performed by the employees, unless in the opinion of the Company, the work can be performed more economically and expeditiously otherwise. If such contracting out of work will result in the lay-off of other than probationary employees, tha matter will be discussed with the Union prior to action being taken by the Company."

[5] No balancing test was applied in *Electric Storage Battery Co., supra; Laclede Gas Co., supra; C.G. Conn, Ltd.*, 56 LA 1145 (Sembower, 1971); *Wyman-Gordon Co.*, 57 LA 688 (Hogan. 1971); or *City of Milwaukee*, 59 LA 537 (Mueller, 1972). Rather, the result in each case turned on findings as to whether or not the employer's subcontract met the specific conditions of the subcontracting clause at issue.

A balancing test was justifiably applied in *Champion Papers*, 51 LA 997 (Volz, 1968), where the arbitrator was construing contract language which prohibited subcontracting "untill all factors have been carefully considered, including but not limited to ... (6) pertinent costs factors," and which prohibited lay-offs of regular employees

evidence in the record that the parties intended to deviate from the language of the subcontracting provision, I must conclude that Arbitrator Kanner exceeded his authority in reading an implied test into the contract at issue here.

The Arbitrator's second reason for upholding the Union's grievance is that where "the result of such literal interpretation of a contract leads to a wholly nonsensical result, it cannot be presumed that the parties intended such a result." (Opin. at 38). I would agree, however, with Arbitrator Koven's observation in *Electric Storage Battery Co., supra,* at 785, that because

> parties to a contract are charged with full knowledge of its provisions and of the significance of its language (Bond Clothes, Inc., 7 LA 708; 711; Carnation Company, 3 LA 229, 232), the clear meaning of language may be enforced even though the results are contrary to the original expectations of one of the parties (American Smelting and Refining Company, 28 LA 557, 558; Western Union Telegraph Company, 20 LA 756, 758-759).

Where a contract provision is the result of free bargaining between the parties, the arbitrator cannot amend the contract or dispense "his own brand of industrial justice," *United Steelworkers* v. *Enterprise Wheel & Car Corp., supra,* at 597;

"as a direct result of using outside contractors." *Id. at 997. The arbitrator interpreted the words "carefully considered" as envisioning "an objective balancing and weighing of all of the relevant factors and a rejection of the proposed contract where the advantage to the Company does not outweigh the injury which will be done to the individual employees affected and to the bargaining unit." Id.* at 1000.

Consolidated Aluminum Co., 66 LA 1170 (Boals, 1976), is an anomalous case in which the arbitrator, without distinguishing between express and silent contracts, applied a balancing test despite a contract provision allowing the company "to subcontract work so long as it is not done for the purpose of depriving bargaining unit employees of bargaining unit work." *Id.* at 1172.

Timken Co. v. *Local Union No. 1123, United Steelworkers of America*, 482 F.2d 1012, 1015 n.2 (6th Cir. 1973), merely because he views the outcome as unfair.

Finally, the Arbitrator distinguishes two arbitration decisions[6] allowing subcontracting on the basis that those contracts specifically authorized lay-offs in the event of subcontracting. However, the Arbitrator cites no authority to support his view that a subcontracting provision itself has to expressly and clearly spell out the employer's right to lay off employees. He rejects without adequate justification the Company's argument that the lay-off and bumping procedure (Article II, Subsection 15) should be read together with the subcontracting provision in this contract and gives the Company the right to lay off employees as a result of subcontracting.

In view of the clear and unambiguous language of Article I, Sections 10(A) and 10(B), of the collective bargaining agreement and the Arbitrator's findings that the Company met these contract conditions prior to subcontracting, and since the record contains no evidence indicating the parties intended to deviate from the literal language of those provisions, I conclude that the Arbitrator's Award does not draw its essence from the collective bargaining agreement and therefore cannot be enforced. An appropriate Order is entered herewith.

/s/ John Feikens
Chief United States District Judge

February 3, 1981

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[6] *Electric Storage Battery Co., supra*, Opin. at 31), and *C.G. Conn, Ltd., supra*, (Opin. at 33).

United States District Court
Eastern District of Michigan
Southern Division

Civil Action No.
80-72597

Sears, Roebuck And Co.,
Plaintiff,

v.

Teamsters Local Union No. 243,
affiliated with the International Brotherhood
of Teamsters, Chauffeurs, Warehousemen
And Helpers Of America,
Defendant.

ORDER

At a session of said Court, held in the U.S. Courthouse, City of Detroit, County of Wayne, State of Michigan, on the third day of February, 1981.

Present: John Feikens
Chief United States District Judge

In accordance with the accompanying Opinion and for the reasons set forth therein,

IT IS ORDERED that plaintiff's motion for summary judgment be, and hereby is, GRANTED, and the defendant's motion for summary judgment be, and hereby is DENIED,

And IT IS FURTHER ORDERED that the Award issued by Arbitrator Richard L. Kanner in this case be, and hereby is, VACATED.

/s/ John Feikens
Chief United States District Judge

APPENDIX D

Supreme Court of the United States

No. A-519

Teamsters Local No. 243, Etc.,
Petitioner,

v.

Sears, Roebuck & Co.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner (

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 11, 1983.

Associate Justice of the Supreme
Court of the United States

Dated this 9th
day of December, 1982

No. 82-1161

Office-Supreme Court, U.S.
FILED
FEB 14 1983
ALEXANDER L. STEVAS,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TEAMSTERS LOCAL NO. 243, affiliated with THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA,

Petitioner,

v.

SEARS, ROEBUCK AND COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a unanimous Court of Appeals, in affirming the judgment of the District Court, acted within its authority when it vacated an arbitration award as a result of its conclusion "that the arbitrator exceeded his authority by amending the express terms of the agreement negotiated by the parties" Pet. App., p. A-4.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TEAMSTERS LOCAL NO. 243, affiliated with THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA,

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v.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner Teamsters Local No. 743 ("the Union") and Respondent Sears Roebuck and Co. ("Sears") had a collective bargaining agreement which contained a provision "vesting exclusively" with Sears the right to subcontract any bargaining unit work provided that three conditions were met: (1) the subcontracted work could be performed more efficiently and

economically outside of the bargaining unit; (2) Sears substantiated such efficiency and economy by submitting "facts and figures" to the Union; and (3) the work was not subcontracted solely to discriminate against the Union. Pet. App., p. A-2. When Sears subcontracted approximately twelve percent of the bargaining unit work, the Union filed a grievance claiming that Sears had violated that subcontracting provision. The arbitrator found that Sears had fully complied with the three contractual prerequisites to subcontracting. Pet. App., pp. A-19-20, A-22, A-62. Notwithstanding these findings, however, as the District Court observed, the arbitrator concluded that "an additional implied condition must be read into the contract, namely, that there must be a balancing of the gain . . . to the employer with the resulting impact on the bargaining unit from the decision to subcontract." Pet. App., p. A-73. Finding that the unspecified "additional condition" had not been met, the arbitrator sustained the grievance.

Sears then commenced an action in District Court seeking to overturn the arbitrator's award. The District Court, applying the *Steelworkers Trilogy*,[1] vacated the award on the basis that the arbitrator had "exceeded his authority in amending the express terms of the contract between the parties" and dispensing "his own brand of industrial justice." Pet. App., pp. A-73, A-77. On appeal, the Court of Appeals reached an identical conclusion. It also determined that, since the arbitrator had "specifically found that Sears had demonstrated the requisite [contractual] bona fides in entering into the challenged subcontract" he "lack[ed] discretion to alter the effect of that [subcontracting] provision by performing, *sua sponte*, a 'balancing test.'" Pet. App., pp. A-2—A-3. The Union's subsequent petition for rehearing was denied with no active judge on the Sixth Circuit moving for rehearing *en banc*. Pet. App., pp. A-6—A-7.

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[1] *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

REASONS FOR DENYING THE WRIT

The petition for writ of certiorari and the decision below present no issues warranting review by this Court. None of the considerations set forth in Supreme Court Rule 17 are present. This case does not involve a constitutional issue, any undecided statutory issue or even "principles, the settlement of which is of importance to the public as distinguished from that of the parties . . ." *Layne & Bowler Corp.* v. *Western Well Works,* 261 U. S. 387, 393 (1923). Nor is there "a real or embarrassing conflict of opinion before the circuit court of appeals" on the issue presented. *Id.* Instead, both the District Court and the Court of Appeals routinely applied the standard of judicial review of an arbitrator's award established by this Court over twenty years ago in the *Steelworkers Trilogy.* While the Petitioner disagrees with their analysis of the facts, the resolution of that controversy does not warrant the utilization of the valuable resources of this Court. See, e.g., *United States* v. *Johnston,* 268 U. S. 220, 227 (1925); Brennan, J., *Some Thoughts On The Supreme Court's Workload,* 66 Judicature 230 (1983).

The Sixth Circuit has not departed, either in this case or any other, from the criteria set forth in the *Steelworkers Trilogy.* To the contrary, the Court of Appeals has repeatedly enforced arbitration awards where the arbitrator "confined [himself] to interpretation and application of the collective bargaining agreement." *Enterprise Wheel,* 363 U. S. at 597. See, e.g., *Falls Stamping & Welding Co.* v. *The International Union United Automobile Aircraft & Agricultural Implement Workers of America,* 575 F. 2d 1191 (6th Cir. 1978); *Kroger* v. *International Brotherhood of Teamsters, Local No. 661,* 380 F. 2d 728 (6th Cir. 1967); *American Federation of Television and Radio Artists* v. *Storer Broadcasting Corp.,* 660 F. 2d 151 (6th Cir. 1981); *Retail Clerks International Association Local Unions Nos. 128 and 633* v. *Lion Dry Goods, Inc.,* 341 F. 2d 715 (6th Cir. 1965); *United Steelworkers of America AFL-CIO* v. *Caster Mold and*

Machine Co., 345 F. 2d 429 (6th Cir. 1965). Concommitantly, the Sixth Circuit has also adhered to the *Trilogy's* admonition that an arbitration award is "legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, *courts have no choice but to refuse enforcement of the award.*" *Enterprise Wheel*, 363 U. S. at 597. (Emphasis added). Where, as in this case and those decisions relied on in the petition for certiorari (p. 6), the arbitrator manifests such an infidelity, the Court correctly vacated the arbitration award. The Court of Appeals has thus adhered to, not departed from, the teaching of the *Trilogy*.

Even assuming, however, that the Sixth Circuit has previously deviated in some manner from the mandate of the *Trilogy*, in this case it did not. The present dispute does not constitute an appropriate vehicle, therefore, to correct any alleged judicial error. The Court of Appeals here did not conclude that the arbitrator's interpretation of the language of the subcontracting clause was improper or in any other way determine the merits of the dispute. The arbitrator, the District Court and the Court of Appeals all were in agreement that Sears had fully complied with the contractual preconditions to subcontracting. The fact that the arbitrator nevertheless chose to disregard this determinative finding and impose an additional prerequisite that was not part of the parties' bargain is what compelled the Court to overturn the award. As the Court noted, to do otherwise, "even though that bargain may, in our eyes, seem 'unfair' or inequitable," would violate the *Trilogy* criteria. Pet. App., pp. A-3—A-5.

The standards applied by the Sixth Circuit in this are not only compatible with the *Trilogy* but with the approach of other Circuits in like situations. The decision below does not, as a result, conflict with the opinion of any other Court of Appeals. The Circuits have uniformly agreed that, where an arbitrator chooses to disregard the language of the collective bargaining

agreement, the award is not entitled to enforcement. See, e.g., *City Electric Inc.* v. *Local Union 77, IBEW*, 517 F. 2d 616 (9th Cir. 1975); *W.R. Grace and Company* v. *Local Union No. 759, Inter. Union of the United Rubber, Cork, Linoleum and Plastic Workers of America*, 652 F. 2d 1248 (5th Cir. 1981); *H.K. Porter Company, Inc.* v. *United Saw, File and Steel Products of America, Federal Labor Union*, 333 F. 2d 596 (3rd Cir. 1964); *N F & M Corp.* v. *United Steelworkers of America*, 524 F. 2d 756 (3rd Cir. 1975); *Monongahela Power Company* v. *Local No. 2332, International Brotherhood of Electrical Workers*, 566 F. 2d 1196 (4th Cir. 1976); *Local 670* v. *Kerr McGee*, 618 F. 2d 657 (10th Cir. 1980).[2]

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[2] The cases cited by the Union (Pet. pp. 8-9), *Loveless* v. *Eastern Airlines, Inc.*, 681 F. 2d 1272 (11th Cir. 1982), *Johnson Bronze Company* v. *International Union of United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO*, 621 F. 2d 81 (3rd Cir. 1980), and *F.W. Woolworth Co.* v. *Miscellaneous Warehousemen's Union, Local No. 781*, 629 F. 2d 1204 (7th Cir. 1980), are inapposite. Those cases either involved ambiguous contract language which, as the Sixth Circuit has recognized, must be construed by the arbitrator (*Detroit Coil & International Association of M & A Workers*, 594 F. 2d 575, 579 (6th Cir. 1979)) or a situation where there was evidence that the parties intended to deviate from the contract language. Accordingly these cases do not present a "real and embarrassing conflict" between the Courts of Appeals.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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